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United States Supreme Court

CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES.

DECEMBER TERM, 1865.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. III.

WASHINGTON, D. C.:
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1870.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

SALMON PORTLAND CHASE.

ASSOCIATES.

Hon. James M. Wayne,	Hon. Samuel Nelson,
Hon. Robert Cooper Grier,	Hon. Nathan Clifford,
Hon. Noah H. Swayne,	Hon. Samuel F. Miller,
Hon. David Davis,	Hon. Stephen J. Field.

ATTORNEY-GENERAL.

Hon. James Speed.

CLERK.

Daniel Wesley Middleton, Esquire.

CIRCUITS, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

NAMES OF THE JUDGES, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE, Hon. S. P. CHASE, Ohio.	FOURTH. Maryland, Delaware, Virginia, North Carolina, and West Virginia.	1864. December 6th. President Lincoln.
ASSOCIATES, Hon. JAS. M. WAYNE, Georgia.	FIFTH. South Carolina, Georgia, Alabama, Mississippi, and Florida.	1835. January 9th. President Jackson.
Vacant.	SIXTH. Louisiana, Arkansas, Kentucky, Tennessee, and Texas.	Commission expired.
Hon. SAML. NELSON, New York.	SECOND. New York, Vermont, and Connecticut.	1845. February 14th. President Tyler.
Hon. R. C. GRIER, Pennsylvania.	THIRD. Pennsylvania and New Jersey.	1846. August 4th. President Polk.
Hon. N. CLIFFORD, Maine.	FIRST. Maine, New Hampshire, Massachusetts, and Rhode Island.	1858. January 12th. President Buchanan.
Hon. N. H. SWAYNE, Ohio.	SEVENTH. Ohio and Michigan.	1862. January 24th. President Lincoln.
Hon. S. F. MILLER, Iowa.	NINTH. Missouri, Iowa, Kansas, Minnesota, and Wisconsin.	1862. July 16th. President Lincoln.
Hon. DAVID DAVIS, Illinois.	EIGHTH. Illinois and Indiana.	1862. December 8th. President Lincoln.
Hon. S. J. FIELD, California.	TENTH. California, Oregon, and Nevada.	1863. March 10th. President Lincoln.

GENERAL RULES,

MADE AT DECEMBER TERM, 1865.

REGULATIONS UNDER WHICH APPEALS MAY BE TAKEN FROM THE COURT OF CLAIMS TO THE SUPREME COURT.

RULE I.

In all cases hereafter decided in the Court of Claims in which, by the act of Congress such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

2. A finding of the facts in the case by the said Court of Claims, and the conclusions of law on said facts on which the court founds its judgment or decree.

The finding of the facts and the conclusion of law to be stated separately, and certified to this court as part of the record.

The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which these ultimate facts are founded. See *Burr* v. *Des Moines Company*.*

RULE II.

In all cases in which judgments or decrees have heretofore been rendered, when either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said peti-

* 1 Wallace, 102.

tion shall contain a distinct specification of the errors alleged to have been committed by said court in its ruling, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as in the judgment of said court shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule I (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court.

RULE III.

In all cases an order of allowance of appeal by the Court of Claims, or the chief justice thereof, in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

AMENDMENT TO RULE XX.

The first paragraph of the twentieth rule of this court is amended so as to read as follows:

In all cases brought here on appeal, writ of error, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same within the first sixty days of the term; but twenty copies of the arguments, signed by attorneys or counsellors of this court, must be first filed; ten of these copies for the court, two for the reporter, three to be retained by the clerk, and the residue for counsel.

ORDER OF COURT.

Ordered, That the several causes brought into this court by writs of error or appeals from the Circuit and District Courts for the several districts within the States declared to be in rebellion by the proclamation of the President of the United States, dated August 16, 1861, be called and disposed of at the next term of this court, under the rules thereof, and in regular order as they may stand upon the docket; and the clerk is directed to cause a copy of this order to be published in three daily papers of the city of Washington.

MEMORANDA.

THE Honorable JOHN CATRON, Esq., Associate Justice, departed this life at his residence in Nashville, Tennessee, on Tuesday evening, May 30, 1865; being near his 80th year, and having sat on this bench for twenty-eight years. He had previously sat for twelve years on that of the Supreme Court of Tennessee; making in all a judicial life of forty years.

He was born in Pennsylvania near the year 1786, and in early childhood was removed first to Virginia, afterwards to Kentucky. About 1812 he began the study of the law in the last-named State, but abandoned for a time his reading at the call of the country, to take up arms in our war of that day against Great Britain; serving under General Andrew Jackson, through at least one campaign. In 1815, however, he was found sufficiently prepared to be admitted to the bar, and succeeding to the practice of a friend then just elected to Congress, became, at an earlier period of life than is usual with practitioners of the law, known upon the circuits. In 1818 he went to reside at Nashville, the metropolis of Tennessee. The next year, so disastrous in the commercial history of our nation, brought to him large concerns of mercantile business, and both reputation and profit. In December, 1824, he was elected by the legislature one of the judges of the Supreme Court of the State, an office which he held till 1836, when he was displaced by a change in the Constitution of the State. He had acted as Chief Justice for about six years before this time. His decisions are reported in different volumes of Yerger.

On the 4th of March, 1837, Congress, by an act of the preceding day, having authorized an additional judge, President Jackson, as almost the last act of his administration, nominated his companion in arms, Mr. Catron, to the bench of the Supreme

Court of the United States. A new circuit, the eighth, then also just created, and composed of Missouri, Kentucky, and Tennessee, was allotted to him. He continued to preside in that circuit till July, 1862; when Congress, having reorganized the circuits, and Missouri being assigned to Mr. Justice Miller, as part of the ninth, Mr. Justice Catron was assigned to the sixth, which included Kentucky, Tennessee, Arkansas, Louisiana, and Texas. He was the presiding justice in this ambit when he died. An obituary notice in one of the journals of the law, derived in part apparently from a eulogy by his honorable and accomplished associate in Missouri, Mr. Justice TREAT, presents some features of his mind and tastes and closing years:

"His knowledge of the land laws of his circuit was large. He had had great experience in them. It was his satisfaction that both at the bar and on the bench he struggled to give full force and effect to statutes of *repose*,—to those laws which would put an end to litigation and strife. He understood the controlling doctrines governing Western titles, and sought so to apply them as to make each settler safe in his landed rights. His decisions on those subjects were practical, tending always to one great end,—the earliest possible settlement of controversy. As the basis of material prosperity rests upon the security of titles to realty, he labored to uphold that security; and the fruit of his labors his circuit has long enjoyed. His knowledge of the common law was good; and his opinions, generally speaking, were based on principles, as he conceived them, rather than on authorities cited. 'I insist,' was his language, 'on thorough legal training and constant study; but object, from whatever source it come, to the parade of authorities; gathered often from the index, having rarely any value in the case, and which, sometimes, is but the address of Vanity to Ignorance.'

"In only one instance, so far as known, did he wish a circuit opinion of his, or of his colleagues, published. That was on a department of law comparatively but little known in the West at that time. But even then he insisted upon his colleague's writing and delivering the opinion; simply adding that he concurred in the result.

"When, however, rebellion burst upon the country, and the border States seemed to be inundated with views fatal to the Constitution and Union, Judge Catron declared at once to his junior on the circuit bench the necessity not only of announcing the law, but of explaining its wisdom and beneficence; as also

of enforcing its justice. Hence, the many written opinions since delivered from the Federal benches in his circuit; and the carefully prepared 'charge to the grand jury' in Missouri, at the special term in 1861, and subsequently. He had neither doubt nor fear, nor hesitancy in that crisis. He was born before the adoption of the Constitution; he had witnessed its influence at home and abroad; he had seen the territory of the republic extended to the Rio Grande and the Pacific Ocean, and new States springing into existence and adding power and glory to the nation abroad; while at home the people had felt the Federal laws and government only through their countless blessings, and the machinery of national administration was moving without jar or injury to any State, or Territory, or district. He had served under Jackson in the field, and afterwards had rallied his countrymen to support him in the threatened disorders of nullification. He knew that, for all evils existing or threatened, the law furnished redress and protection; that there could be no apology for forcible resistance to it; and he had too long administered the Constitution and the laws, and treaties made pursuant thereto, as the *supreme law* of the land, to be deluded by the idea that on matters which belonged to the NATION, State authority could at any time be supreme.

"On the adjournment of the Supreme Court, in the spring of 1861, he hastened from Washington, with his sick and helpless wife, to avert, if possible, the gathering storm. He was compelled to choose first between Kentucky and Missouri, for their circuit terms were in the same month. Trusting to his colleagues at St. Louis for the performance of whatever the law might demand in Missouri, he took his seat on the circuit bench in Kentucky, and, after closing its business, hastened to Nashville. The course of the Missouri State authorities soon became apparent, and the proclamation of its governor, asserting false doctrines, to the ruin of most who acted on them, rendered it proper, in the opinion of the youngest of the circuit judges there, to order a special term of the Circuit Court for Missouri, without waiting to consult his brother judges. Time was important. The required notice rendered it impossible to hold such a term lawfully before the 1st of July. To delay, for the purpose of first communicating with Justice Catron at Nashville, would prevent one of the important purposes for which the term should be held. At that time Judge Wells was at Jefferson City, where the governor had gathered, or was gathering, troops for treason-

able purposes. If a special term of the District Court were held there it might be interrupted, or its process rendered powerless. If a special term of the Eastern District Court were held, its proceedings would not reach those parts of the State where conspirators were chiefly at work. It was deemed necessary, therefore, that the United States Circuit Court should meet at the place fixed by law (St. Louis), because its process and jurisdiction over the whole State was complete, and because the utterances of a full circuit bench would probably command more general attention and respect. Having issued the order, it became necessary to communicate the fact to Justice Catron, then at Nashville, within the rebel lines, from whom nothing had been heard for weeks. Through the assistance of the then district attorney the object was effected, and a reply received promising that he would be at St. Louis if escape through the rebel lines, with life, were possible. Not knowing whether he or Judge Wells would be able to reach the place in time, the necessary charge to the grand jury was prepared by Mr. Justice Treat in advance, and met, on their arrival, their cordial approbation. Its delivery to the grand jury and immediate publication showed that there was no difference of opinion on the bench there, while the opinions delivered on kindred subjects at that term manifested that there would be no judicial hesitancy in upholding the Constitution and laws. That was the last term in which he presided at St. Louis.

"As he was about to leave that city for his home, in Nashville, he conversed freely with his colleagues as to what course the law demanded, and as to his fixed determination to use his utmost efforts to induce the people of his State to adhere to their duty and the Union. Tennessee was in his circuit; he had lived there for more than half a century; his property and kindred were there. His home had always been open to all men of intelligence and worth. Hardly a person of influence had failed to receive his hospitality in times past, or to listen with respect to his counsel. He was resolved to enforce the law as a judge, and as a patriot to reason with, persuade, and advise the people. He feared no personal danger, and did not believe that unkindness could be shown him there. In that he was deceived. Hardly had he reached home when a 'committee' waited upon him, urging him to go away at once. It had been resolved by an excited people that he should not remain without indignity to his person. That visit was the last act of supposed friendship

which those who called on him were suffered to discharge. On the part of the committee the visit was designed as a friendly warning. It is probable that he would have remained and dared the worst if his wife's health and entreaties had permitted. It was for her, and not for himself, that he then left his old home. By the industry of early life he had acquired means to gratify his tastes, friendships, and love of hospitality. He had hoped to spend the remainder of his life peacefully in his allotted work, sharing his joys with life-long friends and associates. He had already passed the threescore years and ten, and had no new ambitions to gratify, and no wish but to perform the duties that lay yet before him. But his hopes of personal repose were gone; and in old age he found himself in alienation from nearly all in whom he had most confided. Still no passion was excited, no vindictiveness stirred within him. His sorrow was the calm sorrow which laments for the folly of others, forgetful of its own suffering. But the wound was deep, and never ceased to prey upon him. His time was absorbed for many months in care for his sick and suffering wife, and, as her health was restored, his own began to fail. In the winter of 1864–5 he was necessarily absent, for the first time, from the place in the highest judicial tribunal of his country, which he had long illustrated by his integrity and patriotism. His former buoyancy was gone; and it may be doubted if any physical health could have long endured the solicitudes which events had placed upon him."

It is a source of high satisfaction to add that, after being driven from his home, this patriotic judge lived long enough to see the tide of rebellion roll back; to return again to Nashville, to resume and to discharge there his judicial duties. And that, before his eyes were closed in death, the glories of a united nation dawned once more upon him. He then sank to rest with faith in the cause of constitutional liberty; "liberty regulated by law."

At the opening of the present term, December 4th, a meeting of the bar and officers of the court was held in the Capitol, and the following resolutions adopted:

Resolved, That the members of this bar and the officers of the court sincerely lament the death of the Hon. JOHN CATRON, late an Associate Justice of the Supreme Court, and express the high consideration they entertain of he integrity, dignity, impartiality, love of justice, and strong common sense which marked his character as a judge and as a man

Resolved, That in manifestation of these sentiments they will wear the usual badge of mourning during the term.

Resolved, That the chairman and secretary of this meeting transmit a copy of these proceedings to the family of the deceased, and assure them of our sympathy and respect.

Resolved, That the Attorney-General be requested to present these proceedings to the court, and to move that they be entered on its minutes.

On the assembling of the court, December 5th, the Attorney-General presented the resolutions. After doing so he remarked:

Mr. Justice Catron presided in the Circuit Court for the district in which I practised. I knew him as a judge from my early years. My acquaintance continually enhanced the respect and admiration with which from the first I regarded him. With the advantage of only limited education he rose easily and pleasantly to the high position he illustrated. Possessing a vigorous mind, diligent habits, earnest and honest purposes, and simple, unaffected manners, his life was one of dignity and usefulness. His loyalty—not the result of location, association, policy, or of mere sentiment, but of simple native integrity, allied to native good sense and firmness—was a sheet anchor to the States of Tennessee and Kentucky during our late troubles. The memory of such a character and such a life goes far to soften the sorrow we feel for the loss the country has sustained. The grave has closed over his remains; but I am sure it cannot shut out from your chamber, so long the scene of his labors, the memory of his character, as it cannot deprive his country of the good he did, or mankind of his bright example.

The resolutions having been read, the CHIEF JUSTICE replied:

The court unites with the bar in honor to the memory of our departed brother Catron, and in sorrow for his loss. He was less known to me than to any other member of this tribunal, and yet sufficiently known to be the object of great respect and sincere esteem. His brethren affectionately remember him as an upright man and an excellent judge. It is their testimony that, in the learning of the common law and of equity jurisprudence, and especially in its application to questions of real property, he had few equals, and hardly a superior. He was even more distinguished by strong, practical good sense, by firmness of will, and straightforward honesty of purpose. Ever frank and earnest in the expression of his opinions, he was yet void of desire to impose them arbitrarily on others. The candor and patience with which he listened to argument found fitting counterparts in the impartiality and equity of his judgments. These judgments remain, and are his best monument. While the records of this court endure they will recall the memory of the just and fearless magistrate who pronounced them, and will be esteemed as valuable contributions to the jurisprudence of his country. They will command from the profession the confidence and respect which was felt for the author by his associates in the court.

As a testimonial of honor, of affection, and of sorrow, the court will order that the proceedings of the bar, with this response, be entered on the records, and will adjourn to-day without transacting its ordinary business.

And thereupon the court adjourned.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1865.

LOVEJOY *v.* MURRAY.

1. A bond of indemnity given by a plaintiff in an attachment to induce the officer to hold, after levy, property not subject to the writ, makes such plaintiff a joint trespasser with the officer as to all that is done with the property afterwards.
2. A judgment against one joint trespasser is no bar to a suit against another for the same trespass. Nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar.
3. A plaintiff in attachment who indemnifies the attaching officer, and afterwards takes upon himself the defence when that officer is sued, is concluded by the judgment against that officer where such plaintiff is afterwards sued for the same trespass.

LOVEJOY brought suit in one of the courts of Iowa against O. H. Pratt, and the sheriff attached certain personal property, which *was assumed to be the property of Pratt.* A certain Murray, however, claimed it as his. The sheriff, now in possession, was unwilling to proceed further in the attachment, or to sell the property under it, unless indemnified by Lovejoy & Co. These parties accordingly executed a bond, in which, reciting that the sheriff *had* attached and taken possession of the property, they bound themselves to pay all damages, &c. The sheriff then proceeded to sell the property under Lovejoy & Co.'s attachment, and under direction of their attorneys.

This being done, Murray sued the sheriff for an alleged trespass. The sheriff gave notice of this suit, as soon as

brought, to Lovejoy & Co., *and they defended it;* counsel, whom they paid, having taken exclusive charge of it. In this suit, Murray obtained

Judgment against *the sheriff* for . .	$6233
Which the sheriff, *without execution issued,* satisfied to the extent of . . .	830
Leaving a balance unsatisfied of . .	$5403

Murray then brought suit against *Lovejoy & Co.* for this same trespass; and the facts being agreed on in a case stated, the court gave judgment for the plaintiffs for the amount of the judgment against the sheriff less the $830 paid by him.

On error here from the Massachusetts Circuit (where Lovejoy & Co. had been sued), three questions were made.

1. Did Lovejoy & Co., in giving the bond of indemnity to the sheriff, become thereby liable as joint trespassers with him in what was done under the attachment?

2. Did Murray, by suing the sheriff alone, and getting *partial satisfaction* of the judgment against *that officer*, bar himself of a right to sue Lovejoy & Co. for the same trespass?

3. Was Murray's judgment against the sheriff conclusive against Lovejoy & Co. in this suit against them?

The case was thoroughly argued on both sides, in this court, on the authorities, ancient and modern, English and our own.

Mr. Hutchins, for Lovejoy & Co., plaintiffs in error.

On the first point, the effect of the bond of indemnity. One may indemnify an officer for an act committed by him, without being himself liable for that act. He may defend a suit against a trespasser without becoming himself a trespasser. "It is sometimes said," remarked Chief Justice Gibson, of Pennsylvania,* "that in levying an execution the sheriff is the plaintiff's agent. Having received a sufficient bond of indemnity, or a tender of it, he is certainly bound to follow

* Fitler v. Fossard, 7 Pennsylvania State, 541; and see Sowell v. Champion. 6 Adolphus & Ellis, 417.

his instructions; but the relation between them is not that of master and servant; for the sheriff is bound to act, not by force of the plaintiff's command, but by force of the command of his writ. He is the agent of the law; and, therefore, it is that when he seizes by the plaintiff's direction the goods of a stranger on a *fieri facias* against the goods of a defendant, the parties do not stand in the relation of joint trespassers. The plaintiff creditor is not a trespasser at all; for the sheriff is bound to stand the brunt of the stranger's action. He acts at his peril, but not without a means of security; and it is his fault if he does not use it."

On the second and principal point; how far the judgment against the sheriff operated as a bar to the suit against Lovejoy & Co.

There seems to be a great conflict of opinion in the books, whether a judgment *alone* against one *tort-feasor* operates as a bar to a suit against another; some holding it to be an absolute bar, others that judgment *with execution* is necessary, and others that *satisfaction* is necessary.

In numerous cases which may be referred to in this country, it has been either decided, declared, or assumed, as we read the cases, that *judgment alone operates as a bar.** This is the direction certainly in which these cases set. Other cases would indicate that judgment and execution so operate;† and in one case‡ it has been held that absolute satisfaction was necessary.

It is impossible to reconcile the American cases. The English courts keep clear of the whole difficulty by treating the judgment, of itself, as a bar; and this we submit is the better doctrine.

* Wilkes v. Jackson, 2 Henning & Munford, 355; Hunt et al. v. Bates, 7 Rhode Island, 217; Rogers et al. v. Moore, 1 Rice S. C. 60, 62; Floyd v. Browne, Adm'r, 1 Rawle, 121; Marsh v. Pier, 4 Id. 288; Fox v. Northern Liberties, 3 Watts & Sergeant, 103, 107; Merrick's Estate, 5 Id. 9, 17; Norris v. Beckley, 2 Mills' Constitutional Reports, S. C., New Series, 228; Johnson et al. v. Packer, Nott & McCord, 1; Wilburn v. Bogan, 1 Spear, 179; Trafton et al. v. United States, 3 Story, 646; Town of Marlborough v. Sisson et al., 31 Connecticut, 332; Ayer v. Ashmead, 31 Id. 447, 458.

† Livingston v. Bishop, 1 Johnson, 290; White v. Philbrick, 5 Greenleaf, 147; Campbell v. Phelps, 1 Pickering, 65.

‡ Sanderson v. Caldwell, 2 Aikin, 195.

The leading English case is *Brown* v. *Wootton*, temp. James I, reported by three different reporters, Yelverton, Croke, and Moore, all essentially in one way.* Sir Henry Yelverton gives the case thus:

"In trover of certain goods in particular, the defendant pleaded that the plaintiff had brought the like action against J. S. for the same goods before this action brought, in which suit he so far *prosequutus est* against J. S. that he had judgment and execution against J. S., and averred that the goods contained in both actions were the same goods. Upon which the plaintiff demurred, and it was adjudged *against the plaintiff*."

This is much in point, and the case was decided in the best days of the old English law; Popham being Chief Justice; Fenner, Gawdy, Sir C. Yelverton, and Williams, eminent names in judicial history, his associates. Mr. Theron Metcalf (now Mr. Justice Metcalf, of the Supreme Court of Massachusetts), commenting on it, A.D. 1820, in his excellent edition of Yelverton, says: "*No case has been found* in which the precise point adjudged in the text, viz., that in the action of trover a former recovery against one of two or more joint *tort-feasors* for the same conversion and a writ of execution sued out is a bar, *has been otherwise decided*."

In *King* v. *Hoare*, A.D. 1844, the Court of Exchequer† decided that a judgment, *without satisfaction*, recovered against one of two *joint* debtors, is a bar to an action against the other; though *secus* where the debt is joint and several. The court, Baron Parke giving its judgment, refers to *Brown* v. *Wootton*, just cited, and declare that "a joint contract cannot be distinguished from a joint *tort*;" thus assuming *Brown* v. *Wootton* to have been rightly decided, and in effect affirming it.

Buckland v. *Johnson*, decided ten years later in the Com-

* Yelverton, 67; Croke Jac. 78; Moore, 672.

† 13 Meeson & Welsby, 504; see, also, Leachmere & Fletcher, 1 Crompton & Meeson, 684; and what is admitted by the S. G. *arguendo*, in Bird v. Randal, 3 Burrow, 1847.

mon Pleas of England,* is to the same result. In that case it appeared that a father and son had wrongfully converted the goods of the plaintiff by selling them; that the proceeds of the sale, £150, were received by the son alone; and that the plaintiff had sued the father, and recovered a verdict for £100 as the value of the goods so converted; but that in consequence of his insolvency he had obtained no satisfaction. He now sued the son. But Jervis, C. J., says: "If two jointly convert goods, and one of them receives the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion, or an action for money had and received to recover the value of the goods for which *a judgment has already passed in the former action*. . . . The fallacy of the plaintiff's argument arises from his losing sight of the fact, that by the judgment in the action of trover the property of the goods was changed, by relation, from the time of the conversion, and that consequently the goods from that moment became the goods of the son;" and his lordship quotes with approbation the language of Baron Parke in the case last cited: "The judgment of a court of record changes the nature of that cause of action, and prevents it being the subject of another suit; and the cause of action, being single, cannot afterwards be divided into two."

But if the court shall be of the opinion that a party may sue and recover *separate* judgments against co-trespassers, and then *elect* which judgment he will enforce, then we say that he recovery of judgment against the sheriff, and the receipt of *partial satisfaction* on that judgment from him before the commencement of this suit, will operate as a bar to this suit. How can the court proceed now to try the original trespass when it has been *partially* settled for? How would a declaration be framed? How would the court proceed at the trial? What becomes of the $800 paid? Must it not be credited in some way, or deducted? and if so, how? The plaintiff is seeking to recover full damage for a wrong partially redressed.

* 15 C. B. (80 English Common Law), 145.

In the Vermont case of *Sanderson* v. *Caldwell*,* which is opposed to our general view, the judgment first recovered was *in no part satisfied.*

On the third point, the effect of the judgment against the sheriff; is it conclusive?

Lovejoy & Co., we think, are not estopped to defend this suit because they gave the sheriff a bond of indemnity, or because they took part in the defence of the suit against him. If this were a suit by sheriff against Lovejoy & Co. upon their bond of indemnity to him against that suit, and upon notice or otherwise they had defended the suit against him, then perhaps as between them and the officer they would have been concluded by the judgment against him. But that is not the question here. The defendants were neither parties nor privies to the judgment against the sheriff.†

Mr. Ball, contra:

On the first question: All persons who direct or request another to commit a trespass are liable as co-trespassers, and giving a bond of indemnity in such case makes the party a trespasser. The proposition is well-established elementary law, and need not be unfolded or enforced. Upon the facts the court will readily apply what we conceive to be both true and applicable.

On the second and principal question: It is a settled principle that all torts are several as well as joint, and that the injured party can maintain an action against all the tort-feasors jointly or against each one separately. Hence such party must have the right to pursue each tort-feasor to judgment and execution till he gets satisfaction. That *satisfaction* is the essential matter appears even in cases contemporary with *Brown* v. *Wootton*, reported in Yelverton, and which seems to be the foundation of the recent decisions in England, and is one of the citations of the opposite counsel. In

* 2 Aiken, 195.

† See Sprague v. Waite, 19 Pickering, 458; Eastman v. Cooper, 15 Id., 279; Church v. Leavenworth, 4 Day, 278.

Cocke v. *Jenner*, reported by Lord Hobart,* the court in speaking of joint trespassers says:

"If they be sued in several actions, though the plaintiff make choice of the best damage, yet when he hath taken one *satisfaction* he can take no more; and if he require *two* an *audita querela* will lie."

The same idea is presented in *Corbett* v. *Barnes*, which arose soon after and is reported in Sir William Jones.† The report is in Norman French, but translated, reads in the material parts, thus:

"Barnes brought trespass of assault and battery, in London, against Hill in the Common Bench and recovered; and afterwards trespass of assault and battery against Corbett in the King's Bench, and two others for the assault and battery in Hertfordshire. Hill was taken in judgment, and afterwards judgment given against the three others in the King's Bench. Hill paid the damages recovered against him, and satisfaction was entered. Then Corbett was taken in execution, when he and the other two brought an *audita querela*, setting forth the whole matter, with an averment that the said assault and battery in London and Hertford was the same assault. And by Justices Jones, Croke, and Barkeley, the *audita querela* lies; for although for the same assault the plaintiff may have several *actions* and recover, yet when a recovery is had against one, and *satisfaction*, he cannot have another *satisfaction;* just as where an obligation is made jointly and severally, and the obligee sues in the Common Bench one by several writ, and recovers, and afterwards sues another in the King's Bench upon the same obligation, nevertheless if one of them makes satisfaction, the other shall have an *audita querela* to avoid the execution; for the plaintiff cannot have *nisi unica satisfactio*. So here the plaintiff can have several *recoveries*, but if one *satisfy*, the other shall have *audita querela* to set aside the execution against him."

* Hobart, 66.

† Sir W. Jones, 377; sometimes cited as first Jones, to distinguish it from Sir Thomas Jones, in the subsequent reign cited as second Jones.

Many American cases decide or declare this explicitly.*

So in the recent English case of *Cooper* v. *Shepherd*,† the former judgment had been paid, although that fact is by mistake omitted in the marginal note. The court say, "The plaintiff, after he has once received the full value, is not entitled to further compensation in respect to the same loss, and according to the doctrine of cases cited in the argument, by a former recovery in trover *and payment of the damages*, the plaintiff's right of property is barred, and the property vested in the defendant in that action. See *Adams* v. *Broughton* (2 Strange, 1078), and Jenkins, 4th Century, Case 88, p. 189, where it is laid down in trespass against B. for taking a horse, A. recovers damages by this recovery and *execution done thereon*, the property in the horse is vested in B., *solutio pretii emptionis loco habetur*."

On the third question. It is submitted that the judgment against the sheriff is conclusive upon Lovejoy & Co. The sheriff was their agent. They directed the attachment and sale; they gave the bond of indemnity; they defended the suit against him, and were the real defendants in it; they paid the attorneys and counsel, and had the exclusive control of the defence. Privies, as well as parties, are concluded by a judgment. Lovejoy & Co. cannot, therefore, again contest the case on its original merits.‡

Mr. Justice MILLER delivered the opinion of the court:

The record before us raises three questions, all of which depend upon the principles of the common law exclusively for their solution.

We will consider them in the order in which they naturally arose on the trial, and in which also they have been argued.

* See Livingston v. Bishop, 1 Johnson, 290; Sanderson v. Caldwell, 2 Aiken, 195; Osterhout v. Roberts, 8 Cowen, 43; Blann v. Crochern, 20 Alabama, 320; Knott v. Cunningham, 2 Sneed, 204.

† 3 Manning, Grainger & Scott, 266.

‡ Rapelye v. Prince, 4 Hill, 119, 123; Calkins v. Allerton, 3 Barbour, 178; Glass v. Nichols, 35 Maine, 328; Warfield v. Davis, 14 B. Monroe, 41, 42; Castle v. Noyes, 14 New York, 329; Farnsworth v. Arnold, 3 Sneed, 252; Griffin v. Reynolds, 17 Howard, 609.

1. *Did the defendants, in giving a bond of indemnity to the sheriff, thereby become liable as joint trespassers with him in the proceedings under the attachment?*

The question arises upon the hypothesis that a writ of attachment was issued in favor of the present defendants against one O. H. Pratt, which was wrongfully levied by the sheriff on property of the present plaintiff. The bond of indemnity given by the present defendants recites upon its face that the sheriff has already levied the attachment; and there is nothing in the case, except the bond, to show that in making the levy, or in anything done by the sheriff prior to the giving of the bond, he acted under the direction or instruction of the defendants, or at their request. That the attaching creditor is not answerable for the act of the officer, unless he in some manner interferes so as to make himself liable, must be conceded. And unless the defendants have so interfered in this case as to incur this responsibility the action cannot be sustained.

It is contended by counsel that a trespass cannot be ratified like a contract so as to make the party liable *ab initio*. But it is not necessary to decide, in this case, whether the defendants by giving the bond became liable for what had been done previous to that time. It is sufficient, if they become liable for what was done by the sheriff after they gave the instrument. The trespass complained of was a continuing trespass, and consisted of a series of proceedings, ending in the sale of the plaintiff's property under execution. At the time the bond was given, the sheriff had merely taken possession of the goods under the attachment. No great injury had, probably, been done. The demand for indemnity, and the giving of it by the defendants, proceeded upon the supposition that the sheriff would without it go no further in that direction, but would give up the property to the claimant, the present plaintiff, and make his peace on the best terms he could. By the present statute of Iowa he had a right to do this, if the plaintiff in attachment refused to assume the hazard of indemnifying him. And if there were no such statute, he had a right to deliver the property to the

claimant, and risk a suit by the plaintiff in attachment, rather than a contest with a rightful claimant of the goods.

The giving of the bond by the present defendants must, therefore, be held equivalent to a personal interference in the course of the proceeding, by directing or requesting the sheriff to hold the goods as if they were the property of the defendants in attachment. In doing this they assumed the direction and control of the sheriff's future action, so far as it might constitute a trespass, and they became to that extent the principals, and he their agent in the transaction. This made them responsible for the continuance of the wrongful possession, and for the sale and conversion of the goods; in other words, for all the real damages which plaintiff sustained.

The first question must, therefore, be answered in the affirmative.

2. *Did the plaintiff, by suing Hayden, the sheriff, alone, recovering judgment for about six thousand dollars, and receiving from him eight hundred and thirty dollars on the said judgment, thereby preclude himself from maintaining this suit against these defendants for the same trespass? Is the judgment, or the judgment and part payment, in that case a bar to this action?*

Parke, Baron, in the case of *King* v. *Hoare*,* speaking in reference to the same proposition in its application to actions on joint contracts, says, in 1846, that it is remarkable that the question should never have been decided in England. It is equally remarkable that the proposition here presented should be an open question at this day.

The faithful and exhausting research of counsel, in this case, shows that there are conflicting authorities, not only on the main proposition, but on several incidental and collateral points closely connected with it. Two propositions, however, seem to be conceded by all the authorities, which bear with more or less force on the main question, and which may as well be stated here.

1. That persons engaged in committing the same trespass

* 13 Meeson & Welsby, 502.

are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may be all sued in one action; or one may be sued alone, and cannot plead the nonjoinder of the others in abatement; and so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.

2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause.

In the latest English case upon the principal question, namely, *Buckland* v. *Johnson*,* Jervis, C. J., holds the former judgment against the son, although fruitless, to be a bar to the second suit against the father for the same goods, upon the ground that by the former judgment the property in the goods was vested in the defendant in that action. As this is the latest case in the English courts which expressly decides the point, it may, perhaps, be received as the English doctrine. But this concession must be made with some hesitation in view of opinions expressed in other cases decided in the same country. In the very case in which that judgment is rendered, the chief justice takes occasion to correct what he supposes to be an erroneous statement of Tindal, C. J., in *Cooper* v. *Shepherd*, to the effect, "that, according to the doctrine of the cases which were cited in argument by a former recovery in trover *and payment of damages*, the plaintiff's right of property vests in the defendant in that action."

It was, therefore, the opinion of C. J. Tindal, that *payment of the damages recovered* is essential to vest the property in defendant, and this only a few years before the case of *Johnson* v. *Buckland* was decided. That case was decided in 1854, and mainly on the authority of *Brown* v. *Wootton*, reported in

* 15 C. B. 145.

Yelverton, as also by Croke, J. The reason for the decision, as given by Popham, C. J., is thus stated in the latter book: "In the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before, is reduced *in rem judicatam*, and to certainty, which takes away the action against others." If the only object, or indeed the principal object, in obtaining a judgment in trespass, was to render certain the extent of plaintiff's injuries, or the amount of damages which would compensate for those injuries, we might be able to comprehend the force of this logic. But as it is the purpose of the law, and the main purpose for which courts of justice are instituted, to procure satisfaction for these injuries, we do not see the sequence in the reasoning of the learned judge.

Brown v. *Wootton* was decided in Trinity Term, 3 James I. Prior to that time, the law had been thought to be the other way.* In *Claxton* v. *Swift*,† Shower said, "it was never pretended, until the case of *Brown* v. *Wootton*, that a bare judgment should be a bar."

In *Cocke* v. *Jenner*, reported by Hobart, and which was in Trinity Term, 12 James I (only nine years after *Brown* v. *Wootton*), the question arose on a release of one joint trespasser, which was held to be a bar to a suit against the other, on the ground that it was equivalent to satisfaction; yet the language of the report leaves a strong impression that it was the opinion of the court that several judgments might be had, and that only satisfaction, or its equivalent, would bar proceedings against all who were liable. And the case of *Corbett* v. *Barnes*, cited from Sir W. Jones (time of Charles the First), which was on *audita querela*, while it holds that only one satisfaction can be had, implies clearly that several judgments may be rendered against joint trespassers. Indeed, that very case was where one judgment had been rendered in the King's Bench against one, and in the Com mon Pleas against three others, for the same trespass.

* See Brooke's Abridgment, Pl. 98; Morton's Case, Cro. Eliz. 30.

† 2 Shower, 494.

These cases show that, after as well as before the case of *Brown* v. *Wootton*, the law was supposed, by some of the ablest judges in England, to be otherwise than what it decides; and we know of no case in which it was followed in England as implicit authority, until *Buckland* v. *Johnson*, in 1854.

The rule in that case has been defended on two grounds, and on one or both of these it must be sustained, if at all. The first of these is, that the uncertain claim for damages before judgment has, by the principle of *transit in rem judicatum*, become merged into a judgment which is of a higher nature. This principle, however, can only be applicable to parties to the judgment; for as to the other parties who may be liable, it is not true that plaintiff has acquired a security of any higher nature than he had before. Nor has he, as to them, been in anywise benefited or advanced towards procuring satisfaction for his damages, by such judgment.

This is now generally admitted to be the true rule on this subject, in cases of persons jointly and severally liable on contracts; and no reason is perceived why joint trespassers should be placed in a better condition. As remarked by Lord Ellenborough, in *Drake* v. *Mitchell*,* "A judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have."

The second ground on which the rule is defended is, that by the judgment against one joint trespasser, the title of the property concerned is vested in the defendant in that action, and therefore no suit can afterwards be maintained by the former owner for the value of that property, or for any injury done to it.

This principle can have no application to trespassers against the person, nor to injuries to property, real or personal, unaccompanied by conversion or change of possession. Nor is the principle admitted in regard to conversions of

* 3 East, 258.

personal property. Prior to *Brown* v. *Wootton*, the English doctrine seems to have been the other way, as shown by Kent, in his Commentaries,* referring to Shepherd's Touchstone,† and Jenkins.‡

We have thus far confined ourselves to the examination of the English authorities, and the principles discussed in them, and we are forced to the conclusion that even at this day the doctrine there is neither well settled nor placed on any satisfactory ground.

In turning our attention to the American cases, we have been able to find but two in which the point directly in issue has been ruled in favor of the bar of the former judgment; although there are some other cases which hold that the right of property is transferred by the judgment. The first of these two cases is *Wilkes* v. *Jackson*.§ This was an early case in the Court of Appeals of Virginia, which seems to have passed without much consideration, and was mainly rested on the judgment of the same court in a former case, which does not appear to sustain it.

The other is the Rhode Island case of *Hunt* v. *Bates*.‖ It is a very recent case, decided in 1862; but the absence of any other reasoning than a mere recapitulation of the English cases, and the remark that upon their authority the court is obliged to rest its decision, deprives it of any other weight than what should be attached to those cases. This we have already considered.

In addition to this, it has been decided in South Carolina and Pennsylvania, that the recovery of a judgment for the value of the goods converted, transfers the title to the defendant. *Rogers* v. *Moore*;¶ *Floyd* v. *Brown*.**

On the other hand, in the case of *Livingston* v. *Bishop*,†† in the Supreme Court of New York, in 1806, Kent, C. J., overrules *Brown* v. *Wootton*, and holds that judgment alone is not a bar.

* 2 Kent, 388. † Title "Gift." ‡ Page 109, Case 88.
§ 2 Henning & Munford, 355. ‖ 7 Rhode Island, 217.
¶ 1 Rice, 60. ** 1 Rawle, 121. †† 1 Johnson, 290.

In *Sheldon* v. *Kibbe*,* decided in 1819, in the Supreme Court of Connecticut, the court, by Hosmer, C. J., enters into an elaborate examination of the authorities, and a full consideration of the question on principle, and lays down the doctrine that neither a judgment, nor the taking of the body of the defendant in execution, will bar a second action against a co-trespasser. Nothing short of satisfaction or release can have that effect.

In *Sanderson* v. *Caldwell*,† in the Supreme Court of Vermont, in 1826, it is held that neither judgment, nor issuing execution, nor anything short of satisfaction, is a bar to a second suit brought against another joint trespasser.

Osterhout v. *Roberts*,‡ a year later, in the Supreme Court of New York, was a plea that defendant's son had been sued, had a judgment rendered against him, and had been taken in execution and imprisoned sixty days for the same trespass. Yet the plea was held bad. The trespass was for taking a watch.

In *Elliott* v. *Porter*,§ Robertson, C. J., of the Court of Appeals of Kentucky, examines the whole subject fully, both on principle and authority, and holds that the first judgment is no bar, and that the title to the property does not pass by judgment in trespass or trover. This case is affirmed by the same court, in *Sharp* v. *Gray*.‖

Blann v. *Cochern*, in Alabama,¶ was an action of trespass. The defendant pleaded a former recovery against a co-trespasser, and payment of the judgment and costs so recovered, to the clerk of the court. But the plea was held bad, because it was not averred that it was accepted by the plaintiff.

In *Knott* v. *Cunningham*,** the Supreme Court of Tennessee held that a former judgment against one tort-feasor, was no bar to a suit against another, for the same tort, without satisfaction.

In *Page* v. *Freeman*,†† the Supreme Court of Missouri held the same doctrine.

* 3 Connecticut, 214.
† 2 Aiken, 195.
‡ 8 Cowen, 43.
§ 5 Dana, 299.
‖ 5 B. Monroe, 4.
¶ 20 Alabama, 320.
** 2 Sneed, 204.
†† 19 Missouri, 421.

In *Floyd* v. *Browne*,* Gibson, C. J., of Pennsylvania, while holding that after a judgment in trover against two trespassers without satisfaction, plaintiff cannot bring assumpsit against another trespasser, uses this language: "A plaintiff is not compelled to elect between actions that are consistent with each other. Separate actions against a number who are severally liable for the same thing, or against the same defendant on distinct securities for the same debt or duty, are concurrent remedies. Trespass is, in its nature, joint and several, and in separate actions against joint trespassers, being consistent with each other, nothing but satisfaction by one will discharge the rest." Trover and assumpsit, however, he holds to be inconsistent remedies.

If we turn from this examination of adjudged cases, which largely preponderate in favor of the doctrine that a judgment, without satisfaction, is no bar, to look at the question in the light of reason, that doctrine commends itself to us still more strongly. The whole theory of the opposite view is based upon technical, artificial, and unsatisfactory reasoning.

We have already stated the only two principles upon which it rests. We apprehend that no sound jurist would attempt, at this day, to defend it solely on the ground of *transit in rem judicatum*. For while this principle, as that other rule, that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we do not perceive its force when applied to a suit brought for the first time against another trespasser in the same matter.

In reference to the doctrine that the judgment alone vests the title of the property converted, in the defendant, we have seen that it is not sustained by the weight of authorities in this country. It is equally incapable of being maintained on principle.

The property which was mine, has been taken from me by fraud or violence. In order to procure redress, I must

* 1 Rawle, 125.

sue the wrong-doer in a court of law. But, instead of getting justice or remedy, I am told that by the very act of obtaining a judgment—a decision that I am entitled to the relief I ask—the property, which before was mine, has become that of the man who did me the wrong. In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrong-doer. It is sufficient to state the proposition to show its injustice.

It is said that the judgment represents the price of the property, and as plaintiff has the judgment, the defendant should have the property. But if the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts.*

But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser, or a release to his co-trespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment.

* 2 Kent, 388-9; Greenleaf on Evidence, § 533; Hyde v. Noble, 13 New Hampshire, 500; Hepburn v. Sewell, 5 Harris & Johnson, 211.

The second question must, therefore, be answered in the negative.

8. *Is the judgment of plaintiff, against the sheriff, Hayden, conclusive against the defendants in this action?*

The facts on which this proposition is based, are the giving of the bond of indemnity by the defendants, and that Hayden, when sued, notified them of the suit, and called on them to defend it; that they did employ counsel to defend it, and that the counsel so employed had exclusive control of the defence of the suit.

The legal facts necessary to enable plaintiff to recover in the present suit are, first, his title to the goods which had been converted; second, the value of those goods; and, third, the participation of the defendants in the conversion. The latter point, we have already seen, is established by the indemnifying bond to the sheriff. Does the record of the judgment against Hayden conclusively establish the other two points, under the circumstances just stated?

We are of opinion that it does.

We have already shown that the effect of giving the bond was to make defendants principals in the transaction, and that so far as the action of the sheriff after that was a trespass, it was directed by them, and was for their benefit. With a just appreciation of their relations to each other in the transaction, he called on them, when sued, to assume the defence; and they did so. They were defending their own acts, although the suit was in the sheriff's name. They had full right to make all defence there, which they could make here. They could adduce witnesses, and cross-examine those of plaintiff, and could have taken an appeal. The case is wanting in none of the elements so happily stated by Mr. Greenleaf,* as rendering a former judgment conclusive in a second suit. "Justice requires," he says, "that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between the same

* 1 Greenleaf on Evidence, § 522–3.

parties, should be closed forever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he is a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be bound. Under the term parties, in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defence, or to control the proceedings; and to appeal from the judgment. This right involves, also, the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings." "The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded." The authorities cited by the learned author fully sustain these propositions.

The present case comes within them, and must be governed by them. In addition, various cases have been examined, which affirm the conclusiveness of former judgments, under circumstances which we are unable to distinguish, in principle, from the one before us, and in several instances the analogy in the facts is perfect. They are presented in the note below.*

This last question must, therefore, be answered in the affirmative.

As the rulings of the Circuit Court were in accordance with the principles here decided, the judgment of that court must be

AFFIRMED, WITH COSTS.

* Ferris v. Arden, Cro. Eliz. 667; Kennedy v. Cope, Douglas, 517; White v. Philbrick, 5 Greenleaf, 147; Roberts v. Prince, 4 Hill, 19; Calkens v. Allerton, 3 Barbour S. C. 178; Glass v. Nichols, 35 Maine, 328; Castle v. Noyes, 14 New York, 329; Warfield v. Davis, 14 B. Monro, 41.

THE PLYMOUTH.

1. Where a damage done is done wholly upon land, the fact that the cause of the damage originated on water subject to the admiralty jurisdiction does not make the cause one for the admiralty.
2. Hence, where a vessel lying at a wharf, on waters subject to admiralty jurisdiction, took fire, and the fire, spreading itself to certain storehouses on the wharf, consumed these and their stores, it was held not to be a case for admiralty proceeding.

THE steam-propeller Falcon, employed by its owners in navigating our great northern lakes, anchored beside the wharf of Hough & Kershaw, in Chicago River; "navigable water." Upon the wharf large packing-houses were built, and these, at the time, were filled with valuable stores. Owing to the negligence of those in charge of the Falcon, the vessel took fire; and the flames, stretching themselves to the wharf and packing-houses, set these last on fire, which with their stores were wholly consumed. Hough & Kershaw filed, accordingly, in the District Court for the Northern District of Illinois, a libel in admiralty, for cause of damage, civil and maritime, against the owners of the Falcon, and attached a vessel of theirs called the Plymouth.

The District Court, regarding the case as not one for the Admiralty, dismissed the libel for want of jurisdiction. The Circuit Court, on appeal, considered that the dismissal was rightly made. The case was now here for review.

It is necessary to say that, by act of Congress,* the District Courts of the United States possess admiralty jurisdiction "in matters of contract and tort arising in, upon, or concerning steamboats or other vessels," on our great northern lakes, the same as they do in cases of the like steamboats, and other vessels employed in navigation and commerce on the high seas and tide-waters.

* Act of February 26, 1845; 5 Stat. at Large, 726.

Argument in favor of the jurisdiction.

Mr. A. W. Arrington, in favor of the jurisdiction:

The question is, has a court of admiralty jurisdiction to decree compensation for the damage done by the Falcon?

The question, as respects instance at least, is one *primæ impressionis*. We can adduce no precedent identical in its circumstances. Two reasons exist for this:

1. Until a recent period the admiralty jurisdiction was repressed and hindered from attaining its appropriate extension by the jealous interference of the common law courts, in England, and by the servile adoption of the English rule, without comment or qualification, in America. That rule excluded the jurisdiction, not only from all waters unaffected by the ebb and flow of the tide, but even from tide-waters within the body of a county. Hence, during the prevalence of such a rule, no case like the present could arise; because, ships could not be the means of setting fire to wharves or houses, without penetrating the body of some county, and then, *ipso facto*, admiralty jurisdiction would be excluded by the English rule.

2. The local distance betwixt the sites of houses and the possible anchorage of vessels, in most parts of the world, prevents, *ex necessitate*, the existence of an occurrence like the one in controversy. It is only at Constantinople, in the Golden Horn; in the harbor of Chicago; and in a few other favored ports of the world, that, in the beautiful language of Gibbon, "ships may rest their prows against the houses, while their sterns are floating in the water."

But the objection that this case is the first of its kind, must be pronounced invalid, in the light of leading decisions of this court. The same objection was urged, with all the weight which learning and eloquence could give it, against those very adjudications which have now become fixed in admiralty law, and was urged in vain; while, at the same time, those adjudications overruled the supreme authority of prior cases, and cases seemingly established among the most permanent doctrines of Federal jurisprudence. Thus, in the *Thomas Jefferson*,* in 1825, this court held that the

* 10 Wheaton, 428.

admiralty jurisdiction was confined "to the sea, or waters within the ebb and flow of the tide."

In *Peyroux* v. *Howard** this doctrine of the former case was approved; the court deciding that if one *terminus* of a voyage was above the flow of tide-water, the mere fact precluded the exercise of jurisdiction. The law of these cases was followed by all the district and circuit courts. The firmness of an enduring principle seemed to have been obtained. In truth, the structure wanted but one thing to insure its permanence,—rational accordance with the spirit of the age and nation, as developed by the characteristics of the physical geography of America.

In 1848, in *Waring* v. *Clarke*,† the Supreme Court took its first step in a path divergent from the *via trita* of the ancient English rule, by adjudging that admiralty had jurisdiction in a case of collision, though happening *infra corpus comitatus*. This was the germination of a new idea. But the full development of reason was reserved for the year 1851, when, in the *Genesee Chief* v. *Fitzhugh*,‡ this same tribunal shook off the yoke of English authority forever, by declaring that "tide-water" constituted no proper test of admiralty jurisdiction. That case has been succeeded by a series of judgments, which established the true criterion of jurisdiction as being "navigable water" *per se*, in contradistinction to water not navigable, and to nothing else. Now, the case of the *Genesee Chief* was the first of its kind. There had been nothing like it, either in England or America, since the days of Lord Coke. It was not only a novelty, but one in clear contradiction of all previous authority.

The objection, therefore, has been overruled in advance.

It must be noted, *in limine*, that the present case, although new in the instance, is not so in principle. On the contrary, the inference we seek to deduce is the logical result of doctrines as old as the common law; and is confirmed, besides, by the analogy of adjudged cases.

First. Let the court consider the nature and character-

* 7 Peters, 324. † 5 Howard, 441. ‡ 12 Id. 443.

istics of the two things concerned in the case of damage,—the object injured, and the agent causing the injury.

I. The object, or part of the object, injured—the wharf—was unquestionably a maritime thing. A wharf is the necessary *terminus, a quo* and *ad quem*, of every voyage, in certain lines of trade; and becomes thus indispensable to commerce and navigation. It is an instrument of navigation. And it has been decided that the lien of a wharfinger appertains to the jurisdiction of the admiralty.* It has even been adjudged that the owner of a shipyard, who employs a railway cradle and other fixtures for hauling vessels out of the water, can sue in the admiralty for his services, though the repairing may be done by other parties.†

II. The agent producing the damage, the vessel which communicated fire to the wharf, was a maritime thing. That fact is conceded.

Hence, since both the object and the agent were maritime things, and within the admiralty jurisdiction, would it not shock common sense to exclude from that jurisdiction the injury received by one from the other, in a case of manifest and admitted tort?

III. The locality was maritime. The ship, the maritime agent, in the very act of committing the injury, was moored in a maritime place, namely: in "navigable water." And this court has determined that "navigable water" is the test of admiralty jurisdiction, in cases of tort.‡

IV. Another legal principle, in connection with the preceding, covers the case.

The principle is this: That the incident, or that which is accessary, always follows, or is drawn to, the principal thing in a given combination of circumstances. Or, as the maxim is announced by Lord Coke,§ "*accessorium non ducit sed sequitur suum principale.*"

The maxim has been applied to the admiralty jurisdiction

* Johnson v. The McDonough, Gilpin, 101.

† 2 Parsons on Maritime Law, 639.

‡ Jackson v. The Magnolia, 20 Howard, 301, 302.

§ Coke Littleton, 152 *a*.

in cases reported by Croke, Levinz, Comberback, Saunders, and others,* and always to this effect: "That when the principal cause is within the jurisdiction, there is also juris diction over the incidents."

In a case in Siderfin† a suit was sustained in the admiralty for beaconage, of a beacon standing on a rock in the sea, for the reason that the admiral had jurisdiction of beacons, although the rock was part of the earth and appertained to the inheritance.

All these are common law cases, running back, too, to the cradle of the system; and they all concur to establish the point ruled, at a later period, in *Le Caux* v. *Eden*:‡ "That when the admiralty has jurisdiction of the original matter, it ought to have jurisdiction of everything incidental."

Hence, the question is, what was the principal matter or thing in this case of damage? What was the original, or, in the language of the schoolmen, the *efficient*, cause of the injury? The answer is: The original cause was the ship; or, rather, the ship in action, and performing a wrongful deed to the damage of others. The composition or chain of causes and effects is simple, being constituted by six links:

1. The ship, a maritime thing, and within the admiralty jurisdiction.

2. The inception of the fire, through the negligence of the master and crew, a maritime wrong, and also clearly within the jurisdiction.

3. The wharf, a maritime thing, and alike within the jurisdiction.

4. The communication of the fire to the wharf.

5. The communication of the fire to the packing-house.

6. The destruction of both the wharf and the packing-house.

Such was the *series implexa causarum*, in logical as in chro-

* Radley v. Egglesfield, 2 Saunders, 259 *e*; S. C. 2 Levinz, 25; 1 Ventris, 173, 174; Anonymous, Id. 308; Anonymous, Croke Elizabeth, 685; Tremoulin v. Sands, Comberback, 462.

† Crosse v. Diggs, p. 158.

‡ Douglas, 580.

nological order. The ship, or the tortious act of the ship, we repeat, was "the original matter, the principal thing," the efficient cause, in the case of damage; and the destruction which followed, in natural sequence, was the incident. If this be so, then, according to all the authorities, the whole case is within the admiralty jurisdiction.

This conclusion, too, is in harmony with scientific theory. It is a law of positive philosophy, that every action in nature derives its specific character and denomination from the agent or principal cause, and not from the object or mere passive thing affected by the action. In a philosophical sense an action is a mere abstract idea, and, in the concrete, means nothing more than an agent acting in a particular manner.

Then, if a tort be perpetrated by a maritime agent, through the instrumentality of a maritime thing, and in a maritime place, must not the tort itself be maritime? To hold otherwise would not only render the law discordant with the beauty of scientific thought, but absurd to common apprehension.

Finally, under this head, it has been determined by this court, that it is sufficient for the agent or principal thing to be maritime, to bring the case within the jurisdiction of the admiralty, although the other thing concerned did not appertain to such jurisdiction. In *Fretz* v. *Bull** it was decided that the jurisdiction attached as against a steamer, by the fault of which a flatboat (of itself, not the subject of admiralty jurisdiction), was sunk in the Mississippi.

Second. This case is a mixed one; and in "mixed cases," arising partly on land and partly at sea, or upon "navigable waters," admiralty has jurisdiction.† Here the wrongful action of the maritime agent commenced upon "navigable water," and was continued to its consummation upon the shore.

Third. The same inference is supported by the analogy of prize cases, in which, even in England, "the jurisdiction

* 12 Howard, 466. † United States v. Coombs, 12 Peters, 72, 76.

depends, not on locality, but on the subject-matter."* The reason of the difference between the respective jurisdictions of the prize and instance courts, in England, arose from the fact that the judges of common law never attempted to restrain the jurisdiction of the admiralty prize court, as to the land; nor to control it by the principle of locality.

Fourth. We claim no more, in this case, than belonged to the admiralty before the jealousy of the common law courts had curtailed its jurisdiction. This, in the language of the commissions to the admiralty judges, comprised "all injuries done upon public rivers," and "upon the shores and banks adjoining them."† In the time of the Commonwealth, the jurisdiction included "all cases of prejudice to the banks of navigable rivers," or to "the docks, wharves, quays," or anything whereby shipping may be endangered.‡

Fifth. The jurisdiction of our colonial vice-admiralty courts was equally extensive, including "all trespasses and injuries, between owners of ships and other persons, done upon the shores of public rivers."§

Sixth. The general maritime law of continental Europe regards only the character of the transaction, and therefore extends to all cases of service, contract, tort, or accident, "relating to ships, shipping, and marine commerce."‖

Can a reason be assigned why the jurisdiction of the American admiralty should not be as broad and beneficial as that of any system of cultivated justice? We are not bound in fetters, by the constitution, to the English rule. If we break the constitution by departing from the English rule, we have already broken it into atoms. We broke it when we suffered the jurisdiction to penetrate into the body of a county. So we broke it when the limit of tide-water was discarded, with the sovereign arbitrament of the moon. And we broke it again, when admiralty jurisdiction was applied to revenue cases.

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* Brown's Admiralty, 208.
† De Lovio v. Boit, 2 Gallison, 452 n.
‡ Benedict, § 107.
§ Id. § 151.
‖ Id. § 211.

Argument in favor of the jurisdiction.

On the other side, there is but one thing to be said, namely, "that in cases of tort, the jurisdiction depends on the locality of the act done, and that it must be done on navigable water." This is properly denominated the "rule of locality."

Now we submit that a bare inspection of the terms comprising the rule shows it to be ambiguous. It may mean that the agent acting must be on navigable water, or that the object must be on navigable water; or that both the agent acting and object acted upon must be on navigable water, and that the total effect must be there too.

But no case has ever so defined the rule of locality as to restrict it to the two latter suppositions. No lawyer ever intimated that both the agent and object must be on navigable water at the time when a tort is committed.

The truth is, that all general rules, all definitions in sciences, other than the mathematical, are what logicians call *dicta secundum quid;* in other words, are postulated with a qualification. It is only in the strict mathematics that the subject can take the place of the predicate, and *vice versâ*, by the change of simple conversion. And especially all legal propositions are *secundum quid* with respect to the cases upon which they are founded.

Let us then see what are the cases adduced in support of the rule of locality.

In *Thomas* v. *Lane*,* a circuit case, the libel was for a tort committed by the master of a vessel upon a mariner. And it was decided that the admiralty had no jurisdiction, because the libel did not allege the trespasses to have been committed on tide-water; while a part of the charge, to wit, the imprisonment, was expressly stated to have been on shore, in the port of Havana. In delivering the opinion, Story, J., said: "In regard to torts, I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the *locality of the act.* The admiralty has not, and never, I believe, deliberately claimed to have, any jurisdiction over

* 2 Sumner, 9.

torts, except such as are maritime; that is, *such as are committed* on the high seas, or on waters within the ebb and flow of the tide."

Here we have the "locality of the act" as the test of jurisdiction, and the circumstance that such act must "be committed on waters within the ebb and flow of the tide," as the explication of the test.

But what were the facts of the case which called for the application of the rule? The case was, that both the agent of the wrong and the object that suffered it were on the shore. The imprisonment was on the shore. The entire act of causation, as well as the entire effect, was on the shore.

If the master, in *Thomas* v. *Lane*, had stood on the deck of his ship while the mariner was chained on the adjacent shore, and had scourged his victim with a long whip, the case would be analogous to ours. But, in such a case, would any court of admiralty in the civilized world have refused to entertain jurisdiction?

But what is the *locality* of an act? The term needs a definition, and this court must supply the need; for you will search the books in vain for anything approximating the *desideratum*. Where, then, is the locality in question? Is it where the agent acts? Or is it where the object is affected? According to science and common sense, it is both conjointly, and neither exclusively. The locality of an act embraces the entire space occupied by the agent and the object, and the spatial distance passed over by the causal influence in accomplishing the effect. Who shall declare the locality of a battle? Is it at the spot where the cannon stands? Or at the spot at which the ball that issues from it strikes its victim? In neither. The locality is the entire field. Where is the locality of the sunbeam? In the mighty orb from which it parts? or in the boundless track through which it passes? or on the earth which it animates with life, and health, and warmth? In no one, assuredly, alone. All are but parts of one stupendous whole; spreading undivided, and which operates unspent.

In *United States* v. *Coombs*,* the rule of locality was announced, by this court, with a qualification. The indictment was for stealing a quantity of merchandise belonging to a ship cast away on the shore of New York. The goods were taken above high-water mark on the beach in Queen's County. The indictment was sustained under the constitutional power to regulate commerce. But the court denied that it could be sustained as falling within the admiralty jurisdiction. Of course, they denied that; because both the agent and object were on the shore. The thief stole the goods on the shore above high-water mark. Story, J., delivering the opinion, said: "Our opinion is, that in cases purely dependent upon the locality of the act done, admiralty jurisdiction is limited to the sea, and to tide-waters as far as the tide flows, and that it does not reach beyond high-water mark. Mixed cases may arise, and, indeed, often do arise, where the acts and services done are of a mixed nature; as where salvage services are performed partly on tide-waters and partly on the shore, for the preservation of the property saved; in which the admiralty has constantly exercised jurisdiction to the extent of decreeing salvage." And he adds: "If the libel is founded on one single continued act, which was principally on the sea, though a part of it was upon the land, as if the mast of a ship be taken upon the sea, though it be afterwards brought ashore, no prohibition lies."

Now, as we have already submitted, ours is a mixed case. The efficient cause was on navigable water. The negligence was there. The act of wrong was committed there. Whatever power for injury the ship possessed originated there, and was exerted there. The ship did not go on shore, the master and mariners did not go on shore, to commit the offence The principal thing, the act of negligence, the destroying agency, was on navigable water, was within the admiralty jurisdiction; and only the incidental effect was produced on the shore.

* 12 Peters, 72.

United States v. *Davis*,* a case like *Thomas* v. *Lane*, of circuit ruling only, and not authoritative therefore, may be thought to be opposed to our view. The facts were these. A gun was fired on an American ship lying in the harbor of one of the Society Islands, by which a person on board a schooner belonging to the natives was killed. "*Held*, that the act was, in contemplation of law, done on board the foreign schooner where the shot took effect; and that jurisdiction of it belonged to the foreign government, and not to the courts of the United States, under the Crimes Act of 1790."

A similar case is that of *United States* v. *McGill*.† The facts were, that the prisoner, the mate on the brig Rover, in the harbor of Cape François, gave the deceased a mortal stroke with a piece of wood. The latter was carried on shore alive, and died the following day. The prisoner's counsel made the point, that both the death and blow must happen on the high seas, to give the court jurisdiction under the act of Congress. The court so decided, for the reason that the act of Congress applied only to murder on the high seas, and because the term murder, *ex vi termini*, implied death.

Both these were criminal cases, and the decisions are in accordance with the technical distinctions of the ancient common law. For under that, by a strange absurdity, "if an offence was commenced in one county, and consummated in another, the venue could be laid in neither, and the offender went altogether unpunished." And so if the blow was given on the land, and the death happened on the sea, and *vice versâ*, neither the courts of common law, nor the admiral's court had any jurisdiction of the crime.‡

This ridiculous *non sequitur* resulted, according to Blackstone, from the technical formula prescribed for the grand jury, since they were only to inquire *pro corpore comitatûs*. Thus, if the blow happened in county A., the grand jury of county B. could not inquire of that; and if the death happened in B., the grand jury of A. could not inquire of that.

* 2 Sumner, 482.

† 4 Dallas, 426.

‡ 1 Chitty's Criminal Law, 177, 180.

And the same logic applied with equal force to the land and sea.

This species of reasoning, or rather, this *reductio ad absurdum* of the reasoning process itself, was in perfect accord with the philosophy of the age. It was the age of the scholastic philosophy—an age of *dicta* and *contradicta*—an age when the highest human ingenuity was perverted to inquiries respecting the eternal puzzles that lie beneath the basis of all finite knowledge; when the mightiest minds sought to postulate the difference between entities and quiddities; when the all-engrossing questions were, whether angels existed in or out of space? And, if in space, how many angels could dance on the point of a needle? And whether the Deity loved an actual entity of the lowest grade better than a possible entity of the highest?

This was the philosophy in vogue when the common law distinctions as to venue were fabricated. And the law always derives the methods of its logic from the philosophical character of the time when it is elaborated.

The reasoning of the early English courts on the subject of venue was nearly akin to the old Eleatic demonstration as to the impossibility of motion. "If a body moves at all," argued Zeno, "it must either move where it is, or where it is not: but it cannot move where it is; and surely it cannot move where it is not; *ergo*, it cannot move at all." And the only answer to the logic that all antiquity could make, was given by Diogenes, who got out of his tub, and walked.

By the same process of reasoning that the English courts employed to exclude the jurisdiction when the blow was struck in one county, and the death happened in another, it is easy to prove that the man was not killed at all. Thus, if this man was killed at all, he must have been killed at some particular place: but he was not killed at any particular place; therefore, he was not killed at all. Or thus: If a man is killed at all, he must be either killed on the land or sea; but this man was not killed on the land, because the mortal blow was not given there, but on the sea; and he was not killed on the sea, because he did not die there, but

on the land: therefore, he was not killed at all. There you have as good a demonstration as the schoolmen ever uttered.

And that is the precise argument, *mutatis mutandis*, that is urged against the admiralty jurisdiction in the present case.

But is this a case, is this an age, is this the court, for the prevalence of such parodies on all scientific ratiocination? Contrariwise, is not this rather a case for the exercise of that kind of logic which appertains more to the enlarged policy of the most enlightened and liberal statesmanship than to the technical quibbles of puerile and perverted dialectics? For, whatever reasons justify the admiralty jurisdiction in any case, must justify it in this. Upon what reason is the jurisdiction founded? Is it the necessity for process as speedy as the hoisting of the sails; that shall go at once *velis levatis*, as Lord Mansfield worded it? That reason exists in such a case as this. Or is it the necessity for a tribunal thoroughly versed in maritime laws and usages? That reason exists here. And as we have shown, there is nothing opposed to the jurisdiction in this case, but a false and preposterous construction of the rule of locality, and which has not the sanction of a single authoritative case.

We do not ask the court to amplify the jurisdiction of the admiral; we but ask it to deduce from his original jurisdiction that which is logically and consequentially involved. If any continent exists entitled to have the jurisdiction amplified to its full extent it is ours,—a continent which, by distinction from all others, may be called the continent of waters,—a continent covered by mighty rivers and majestic lakes. Though not subjects of admiralty jurisdiction, as once understood here and as still understood in England, we have been compelled to bring these under such control. It is fitting that the further development should come from the region of these great waters; which has thus already cast the rich hues of its western sunlight upon the east. The necessity of a power to administer justice speedily and surely is great; and will become greater with the incalculable expansion of trade and commerce on the western lakes and rivers. The vessel which has done the wrong speeds away,

and with the winds and currents is carried thousands of miles from the scene of the wrong she has done. Why send the injured suitor to a distant State in order to have redress?

The ultimate question reverts. Will you be fettered in the freedom of your judicial action by a fiction of the scholastic ages, or yield to the force of a present reality? Will you follow the example of the most enlightened continental jurisprudence, and which is in harmony with the physical geography of this grand new world; or will you cling with servile submission to the petty precedents of little England, whose people, beyond all people, are individual and local in their views, and in more senses than one remain the "*penitus toto divisos orbe Britannos?*"

Mr. Spalding, contra.

Mr. Justice NELSON delivered the opinion of the court:

The court below dismissed the libel for want of jurisdiction; and that question is the only one that has been argued in this court.

It will be observed, that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over marine torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark.

In the case of *Thomas* v. *Lane*,* Mr. Justice Story, in a case where the imprisonment was stated in the libel to be on shore, observed: "In regard to torts, I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has

* 2 Sumner, 9.

not, and never, I believe, deliberately claimed to have, any jurisdiction over torts, except such as are maritime torts; that is, torts upon the high seas, or on waters within the ebb and flow of the tide." Since the case of the *Genesee Chief*, navigable waters may be substituted for tide waters. This view of the jurisdiction over maritime torts has not been denied.

But it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that, as the origin of the wrong was on the water, in other words, as the wrong began on the water (where the admiralty possesses jurisdiction), it should draw after it all the consequences resulting from the act. These mixed cases, however, will be found, not cases of tort, but of contract, which do not depend altogether upon locality as the test of jurisdiction, such as contracts of material-men, for supplies, charter-parties, and the like. These cases depend upon the nature and subject-matter of the contract, whether a maritime contract, and the service a maritime service to be performed upon the sea, or other navigable waters, though made upon land. The cases of torts to be found in the admiralty, as belonging to this class, hardly partake of the character of mixed cases, or have, at most, but a very remote resemblance.*

They are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship and there exercising unlawful authority over him. The substance and consummation of the wrong were on board the vessel—on the high seas, or navigable waters—and the injury complete within admiralty cognizance. It was the tortious acts on board the vessel to which the jurisdiction attached.

This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine

* Thomas v. Lane, 2 Sumner, 2; The Huntress, per Ware, J., Davies, 85; United States v. Magill, 1 Washington C. C. 463; 4 Dallas, p. 345, 2d ed.; Plumer v. Webb, 4 Mason, 383–4; 1 Kent, 367* and n.

torts, namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words the cause of damage, in technical language, whatever else attended it, must have been there complete.

Much stress has been given to the fact, by the learned counsel who would support the jurisdiction, in his argument, that the vessel which communicated the fire to the wharf and buildings, was a maritime instrument, or agent, and, hence, characterized the nature of the tort. In other words, that this characterized it as a maritime tort, and, of course, of admiralty cognizance.

But this, we think, is a misapprehension. The owner of a vessel is liable for injuries done to third persons or property by the negligence or malfeasance of the master and crew while in the discharge of their duties and acting within the scope of their authority. It is upon this principle that the defendants are liable, if at all, to the libellants for the damages sustained. The circumstance that the agents were in the employment of the owners on board the vessel, and that the negligence occurred, while so employed, and which occasioned the damage, gives to the libellants the right of action. But, if they had been employed upon any other structure in the river—on a raft, or floating platform, for work, on the river, and the fire had been communicated to the wharf and buildings on account of their negligence while so engaged, the right of action would have been the same. The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.

A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. The fact, there-

fore, of its having taken place on board the propeller Falcon, in the present case, is not an element that imparts any peculiar character to the nature of the tort complained of. This is so in cases of collision, in which the offending vessel may be attached and proceeded against as one of the remedies for the wrong done. The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.

We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board of a vessel, except as evidence that it originated on navigable waters—the Chicago River; and, as we have seen, the simple fact that it originated there, but, the whole damage done upon land, the cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction. The negligence, of itself, furnishes no cause of action; it is *damnum absque injuriâ*. The case is not distinguishable from that of a person standing on a vessel, or on any other support in the river, and sending a rocket or torpedo into the city, by means of which buildings were set on fire and destroyed. That would be a direct act of trespass; but quite as efficient a cause of damage, as if the fire had proceeded from negligence. Could the admiralty take jurisdiction? We suppose the strongest advocate for this jurisdiction would hardly contend for it. Yet, the origin of the trespass is upon navigable waters, which are within its cognizance. The answer is, as already given: the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends—on the high seas or navigable waters.

The learned counsel, who argued this case for the appellants with great care and research, admitted that it was one of first impression; that he could find no case in the books

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like it. The reason is apparent, for it is outside the acknowledged limit of admiralty cognizance over marine torts, among which it has been sought to be classed. The remedy for the injury belongs to the courts of common law.

DECREE AFFIRMED.

THE KIMBALL.

1. Stipulations in a charter-party requiring the delivery of the cargo within reach of the ship's tackle, and providing that the balance of the charter-money remaining unpaid on the termination of the homeward voyage shall be "payable, one-half in five, and one-half in ten days after discharge" of the cargo, are not inconsistent with the right of the owner to retain the cargo for the preservation of his lien.
2. A clause in a charter-party, by which the owner binds the vessel, and the charterers bind the cargo, for the performance of their respective covenants, is sufficient to repel doubt arising upon the construction of other stipulations not plainly controlling them, as to whether the lien for freight was intended to be waived by the parties.
3. By the general commercial law a promissory note does not extinguish the debt for which it is given, unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. And although in Massachusetts the rule is different, and the presumption of law there is that a promissory note extinguishes the debt for which it is given, yet there the presumption may be repelled by evidence that such was not the intention of the parties; and this evidence may arise from the general nature of the transaction, as well as from direct testimony to the fact.
4. Upon this ground it is not to be presumed that the owner of a ship, having a lien upon a cargo for the payment of the freight, intended to waive his lien by taking the notes of the charterers drawn so as to be payable at the time of the expected arrival of the ship in port. The notes being unpaid, he may return them and enforce his lien.

THE owner of the Kimball chartered her, in July, 1856, to a Boston firm, for a round voyage from New York to Melbourne, Calcutta, and Boston. The charter-party, in most of its provisions, was in the usual form. A portion of the charter-money was to be paid, and was paid, before or

during the voyage; "balance," the instrument proceeded, "payable, one-half in five and one-half in ten days, *after discharge of homeward cargo.*"

The charter-party contained, also, a clause that the cargo should "be received and *delivered within reach of the ship's tackles at the ports of lading and discharging*," and concluded with the not unusual provision, that for the performance of its covenants the parties bound themselves—the party of the first part, the vessel, her freight, tackle, and appurtenances; the party of the second, the freight and merchandise to be laden aboard—each to the other, in the penal sum of $40,000.

While the ship was yet at sea, the charterers, at the owner's request, gave him their notes for $10,000. They were drawn so as to be payable near the time when it was expected that the ship would arrive; and it appeared by the testimony of the broker who had been concerned in the matter, that they were given for the accommodation of the owner, and were to be held over or renewed in case they fell due before the ship reached home. The owner, in a receipt for the notes, stated that he had received them "*on account of the charter*," and that it was "understood that this amount was to be insured by the charterers and charged to the owners of the ship." The owner used the notes, and obtained money on one of them at a bank where he had an account. The charterers effected insurance on the $10,000, in pursuance of the agreement. The vessel arrived about five weeks before the notes by their terms fell due.

Shortly before the vessel arrived home, and before the notes fell due, the charterers failed. The owner immediately tendered them back their notes, but they would not receive them.

By the terms of the charter-party the cargo was to be deliverable to the consignees, "they paying freight as per charter-party," and after the arrival of the vessel, the owners, asserting a lien on the cargo for the unpaid money, and refusing to credit as payment on account, the notes for $10,000, filed a libel in the District Court for Massachusetts to enforce the lien. This libel was filed on the 18th March, 1858; the

notes, which were produced and tendered in court, having fallen due on the 8d preceding. On appeal to this court from the Circuit Court, where the matter went on appeal from the District Court, two questions arose.

1. Whether the ordinary lien of the ship-owner was displaced by anything in the charter-party?

2. Whether the notes of the charterers were to be considered as payment?

The Circuit Court, reversing the District Court, had held negatively on both points.

Mr. Thaxter for the owners of the cargo, appellants:

I. In *Raymond* v. *Tyson** it is said, by Wayne, J., that the lien of the ship-owner for freight or hire "may be considered as having been waived without express words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of the lien, or where it can be fairly inferred that the owner meant to trust to the personal responsibility of the charterer."

Neither will the subsequent insolvency of the charterer restore a lien once waived or lost. In *Alsager* v. *The St. Katherine Dock Co.*,† a case like this, where insolvency had given rise to the litigation, Chief Baron Pollock said, "Did the owner intend to abandon his lien and receive payment of the freight two months after the inward report, or did he mean to retain his lien, and keep his right to refuse delivery of the cargo until the freight was paid? If the ship-owner could not have refused to deliver the goods *provided the charterer had continued solvent*, he cannot maintain that claim now."

Now, we say that the stipulation in the charter, that the cargo should be *delivered within reach of the ship's tackle*, is inconsistent with the right of retaining it to enforce the lien set up; which retention involves the unloading and storing of the cargo.

* 17 Howard, 59; see also Dimech v. Corlett, 12 Moore, Privy Council, 199.

† 14 Meeson & Welsby, 794.

Independently of this stipulation, the credit given for the payment of the balance of the charter-money after discharge at the home port, is inconsistent with the existence of a lien and the discharge of the ship and the delivery of the cargo according to the usual and customary manner. This clause giving this credit was inserted *for the benefit of the charterers.* It is not merely a formal part of the charter, but is a living, active provision, having reference to the contract intended to be made, and such a construction must be given to the charter as shall make this clause operate as a beneficial credit.

Again: we think that by the true construction of this charter, the parties intended that the cargo should be discharged and delivered in the usual and customary manner. If, then, the retention of the cargo for the purpose of retaining a lien thereon until the expiration of the credit, will prevent the discharge and delivery of the cargo in the usual and customary way, such retention cannot be authorized.* The usual and customary course is to give notice to the consignee or owner of the goods when his goods are to be discharged, and then to discharge them upon the wharf, when the liability of the carrier as such ceases, and the goods are at the risk of the owner.† But to give full effect to the credit specified, and preserve the lien, the master must have discharged his cargo and *stored* it, no matter how many different sub-freighters there may have been.

The printed clause at the end of the charter-party,—a clause found in nearly all charter-parties—which agrees to bind the freight and merchandise to be laden on board to a performance of the contract,—has no application to this part of the contract. As was said by Baron Bramwell, in *Foster* v. *Colby*,* "The true meaning of that clause is, that the owner is to have a lien so far as a lien is possible." Baron Watson, in the same case, said, in reply to the argument that this clause gave an absolute lien on the cargo, "It is impos-

* Foster v. Colby, 3 Hurlstone & Norman, 705; Alsager v. St. Katherine Dock Co.

† Richardson v. Goddard, 23 Howard, 28; Houlden v. The General Steam Nav. Co., 3 Foster & Finlason, 170; Black v. Rose, 10 Jurist, N. S., 1009

sible there can be a lien for money not due." And again, "If the vessel is discharged abroad, the freight is 'to be paid in cash on right delivery of the cargo.' The clause giving a lien would attach in that case. The true meaning is, that wherever there can be a lien the ship-owner is to have it," &c. So in this case, the clause giving a lien would attach to the outward freight and to demurrage.

The cases of *The Volunteer*,* and of *Certain Logs of Mahogany*,†—circuit rulings of the late Story, J.,—might be supposed to militate with our view. But they do not. The former is distinguishable from this. There the freight was payable "within ten days after the schooner's return to Boston." It appeared by the duty-collection list that the time for entering at the custom-house was such that Story, J., found "that an *unlivery* could be rightfully postponed beyond the ten days after the return of the ship, when by the terms of the charter-party the freight would become due."

The case of *Certain Logs of Mahogany* is peculiar, and can well stand upon the fact that it was agreed that the cargo should be subject to the lien for freight, notwithstanding the provision making the freight payable in five days after her discharge.

II. *As respects the notes.* We suppose it to be well settled where an advance is made upon freight or charter-money, in money or notes, with an agreement that the advance is to be insured for or by the shipper or charterer, that such advance shall be treated as a pre-payment of freight, at the risk of the shipper, which, to the extent of it, discharges the lien.‡

And whatever may be the doctrine of particular States as to the effect of taking a promissory note on the original debt, yet it is equally true that it will be treated by all courts, everywhere, as payment, where it appears that the parties so intended it: as we think it was intended here.

* 1 Sumner, 570. † 2 Id. 602.

‡ Hicks v. Shield, 7 Ellis & Blackburne, 633; Jackson v. Isaacs, 8 Hurlstone & Norman, 405; Trayes v. Worms, 12 Law Times, N. S., 547; Tolmaco v. Simpson, 13 Id. 160.

Whether these notes are to be considered as payment or not, it is well settled that no action could be brought on the original debt until their maturity, and the taking of them was tantamount to an agreement on the part of the owner to give the charterers the credit expressed on their face for that amount of the charter-money.* The notes were not due when the ship arrived and the cargo became deliverable, nor till five weeks afterwards.

Mr. B. R. Curtis, who argued the case fully on principle and authorities, contra.

Mr. Justice FIELD delivered the opinion of the court:

Two questions are presented for determination in this case: *first*, whether the lien of the owner of the ship upon the cargo for the freight was waived or displaced by the stipulations of the charter-party; and, *second*, whether the notes given for a portion of the charter-money constituted payment of the same.

It is admitted that the lien of the owner of a ship upon its cargo for freight is favored by the courts; and will not be displaced, so long as the ship-owner retains possession of the cargo, except by express contract, or by stipulations in the charter-party inconsistent with its exercise. The position of the appellants is, that there are such inconsistent stipulations in the charter-party in this case; and two clauses are mentioned in support of this position,—the clause requiring the delivery of the cargo within reach of the ship's tackle, and the clause providing that the balance of the charter-money remaining unpaid on the termination of the homeward voyage shall be "payable one-half in five and one-half in ten days after discharge" of the cargo.

There is nothing in these provisions inconsistent with the right of the owner to retain the cargo for the preservation of his lien. The first clause only designates the place where the delivery must be had, which, in this case, is the wharf at which the ship may be lying. The second clause only

* Belshaw v. Bush, 11 Common Bench, 191; Price v. Price, 16 Messon & Wels ›y, 239; Wheeler v. Schroeder, 4 Rhode Island, 383.

prescribes the period in which payment must be made after the discharge of the cargo. The discharge mentioned does not import a delivery of the cargo; it only imports its unlading from the ship. Such is the obvious meaning of the term, and so it has been judicially held.* The clause was intended for the benefit of the charterers. It gives them ample time to examine the goods, and ascertain their condition, and decide whether they will take them and pay the freight, or decline to receive them. They can waive it and take the cargo short of the period designated, if it be ready for delivery.

The cases cited by the appellants do not support their position. In *Foster* v. *Colby*,† the charter-party provided that the remainder due for freight should be paid "in cash two months from the vessel's report inwards at London or Liverpool, and after right delivery of the cargo." The stipulation for the payment *after* the delivery of the cargo was inconsistent with the existence of a lien. In *Alsager* v. *St. Katherine Dock Co.*,‡ the charter-party contained two clauses, one providing for the delivery of the cargo on payment of the freight at a stipulated price, and the other providing for the payment of the freight "two months after the vessel's inward report at the custom-house." The court reconciled these clauses by annexing to the first the qualification as to the time of payment contained in the second, and read them together as requiring payment two months after delivery. The payment being thus considered to be irrespective of the delivery, it followed that no lien existed.

There is no doubt that a credit for the freight may be given for so great a period as to justify, in the absence of any provision for the delivery of the cargo, the inference that the ship-owner intended to waive his right to a lien, and to look solely to the personal responsibility of the charterers. It is sufficient, however, that there is no such credit given in the present case. Here the period allowed is only a reasonable one for examining the condition of the cargo.

* Certain Logs of Mahogany, 2 Sumner, 589.

† 8 Hurlstone & Norman, 705. ‡ 14 Meeson & Welsby, 794.

But if there were any doubt as to the construction of the provision for the credit, it is dispelled by the concluding clause of the charter-party. By that clause the owner binds the vessel, and the charterers bind the cargo for the performance of all their respective covenants, of which the payment of the charter-money is one. Though the law, in the absence of any stipulations on the subject, ordinarily implies this mutual security in every contract of affreightment, yet its distinct statement in the charter-party shows that the attention of the parties was called to it, and is an important circumstance to be considered in the construction of other stipulations of the instrument respecting the payment of the freight.

In the case of the *Schooner Volunteer*,* Mr. Justice Story had occasion to consider the effect of a similar clause in a charter-party. In that case the charterers had agreed to pay for the freight "within ten days after the return of the vessel to Boston," or in case of loss after she was last heard from; and the question was, whether the allowance of the ten days for the payment of the freight amounted to a waiver of the lien? The learned judge held that it did not, and in this connection considered the effect of the clause named. After an extended examination of the authorities, he came to the conclusion that it contained an express contract for a lien; and if it did not, still that it contained enough to repel any notion that the delivery of the goods should precede the payment of the freight, or that the lien of the maritime law for freight was intended to be waived by the parties.

The second question for determination is, whether the notes given for a portion of the charter-money constituted payment of the same?

The notes were given before the termination of the voyage, and, consequently, before the balance of the charter-money became due. Treating them as an advance of a portion of the freight, they could be recovered back, or their amount, if paid, if the vessel did not arrive. Freight being

* 1 Sumner, 551.

the compensation for the carriage of goods, if paid in advance, is in all cases, unless there is a special agreement to the contrary, to be refunded, if from any cause not attributable to the shipper the goods be not carried.* And there was no such special agreement in this case. The notes were drawn so as to mature near the time of the anticipated arrival of the ship, and according to the statement of the broker who made the arrangement, they were given for the accommodation of the ship-owner, and were to be held over or renewed in case they fell due before the arrival. This statement is consistent with the nature of the transaction, and is sufficient to repel any presumption, under the law of Massachusetts, that the notes were taken in discharge or payment of the claim for the charter-money. The presumption which prevails in that State, that a promissory note extinguishes the debt or claim for which it is given, may be repelled by any circumstances showing that such was not the intention of the parties.

By the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. Thus it was said, as long ago as the time of Lord Holt, that "a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so."† Such has been the rule in England ever since; and the same rule prevails, with few exceptions, in the United States. The doctrine proceeds upon the obvious ground, that nothing can be justly considered as payment in fact, but that which is in truth such, unless something else is expressly agreed to be received in its place. That a mere promise to

* Watson v. Duykinck, 3 Johnson, 335; Griggs v. Austin, 3 Pickering, 20; Phelps v. Williamson, 5 Sandford, 596.

† Clark v. Mundel, 1 Salkeld, 124.

pay cannot of itself be regarded as an effective payment is manifest.

The rule in Massachusetts is an exception to the general law; but even there, as we have said, the presumption that the note was given in satisfaction of the debt may be repelled and controlled by evidence that such was not the intention of the parties, and this evidence may arise from the general nature of the transaction, as well as from direct testimony to the fact. Thus, in *Butts* v. *Dean*,* where a note was given for a debt secured by the bond of a third person, it was held that it was not to be presumed that the creditor intended to relinquish his security, and, therefore, the note was not to be deemed payment for the original debt. And following this and other like authorities of that State, Mr. Justice Sprague, of the United States District Court, held that a lien for materials furnished a vessel built in Massachusetts, a lien given in such a case, by a law of that State, was not displaced or impaired by the creditors taking the notes of the debtor.†

And on like grounds, we think that any presumption of a discharge of the claim of a ship-owner, and of his lien upon the cargo in this case, by his taking the notes of the charterers, is repelled and overthrown.

DECREE AFFIRMED.

CASTRO *v.* UNITED STATES.

1. Appeals from the District Courts of California, under the act of 3d March, 1851—which, while giving an appeal from them to this court, makes no provision concerning returns here, and none concerning citations, and which does not impose any limitation of time within which the appeal may be allowed—are subject to the general regulations of the Judiciary Acts of 1789 and 1803, as construed by this court.

Hence, the allowance of the appeal, together with a copy of the record and the citation, when a citation is required, must be returned to the next term of this court after the appeal is allowed.

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* 2 Metcalf, 76. † Page v. Hubbard, Sprague, 333.

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2. An appeal allowed or writ of error issued must be prosecuted to the next succeeding term; otherwise it will become void.
3. The mere presence of the District Attorney of the United States in court, at the time of the allowance of an appeal, at another term than that of the decision appealed from, and without notice of the motion or prayer for allowance, will not dispense with citation.

THE Judiciary Act of 1789 allows examination, by this court, of final judgments and decrees given in the circuits,* "upon a writ of error, whereto shall be annexed and returned therewith, *at the day and place therein mentioned*, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party," such party having a notice prescribed in the act. A subsequent act of 1803,† which gives an appeal from decrees in chancery, subjects it to the rules and regulations which govern writs of error. But nothing is said, specifically, in either act, as to *when* the writ of error, the citation, or the record is to be returned to this court.

An act of March 3d, 1851,‡ to ascertain and settle private land claims in the State of California, authorizes, by its tenth section, the District Courts there to hear cases of a certain kind, and declares that after judgment they "shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States on such security for costs in the District and Supreme Court as the said court shall prescribe." But says nothing more on this subject.

Under this act of 1851, the District Court for the Northern District of California rendered a decree, on the 23d of November, 1859, in a case between Castro, claimant, and the United States. On the 24th of January, 1860, an appeal was granted, on motion by the United States. This appeal seems to have been dismissed; and on the 11th of November, 1864, an appeal was allowed, on the motion of the claimant, the then *District Attorney of the United States being*

* Act of September 24, 1789, ch. 20, § 22; 1 Stat. at Large, 84.
† Act of March 3, 1803, ch. 40, § 2, 2 Id. 244.
‡ Ch. 41; 9 Id. 633.

present in court. No citation was issued upon this appeal returnable to the next term of this court, nor was the record filed and the cause docketed during that term. On the 29th of May, 1865, however, a citation was issued, returnable at this term, and service of this citation was acknowledged by the present district attorney; and the writ was returned and the record filed at this term, under an agreement between the district attorney and the attorney for the claimants, to submit the cause upon printed briefs. This arrangement was subject to the approval of the attorney-general, who withheld his approval.

He now moved to dismiss the appeal.

Mr. Wills, representing the attorney-general, in support of the motion: It is true that the act of 1789 does not specifically say that the record, &c., is to be returned to the next term, but it does say so impliedly; and so this court have held. Thus, in *Vilabolos* v. *United States*,* they say: The *writ of error* is *always* returnable to the term of the appellate court next following the date of the writ; and the *citation* required by the act of 1789 (which is a summons to the opposite party to appear), must be returnable to the same term; and unless the writ and citation are both served before the term the case is *not* removed to the appellate court, and the writ, if returned afterwards, will be quashed. In *United States* v. *Curry*,† the court, referring to *Vilabolos* v. *United States*, said: "The court, in that case, held that the appellant must prosecute his appeal to the next succeeding term;" and in a case long after either,‡—referring to the two cases just cited—they declare: "The *construction* of this act of Congress and the practice of this court under it has been settled."

This settled practice of the court, under the early acts, must be held to regulate an enactment in *pari materiâ;* and such seems to have been the view of the court as it is to be gathered from the very curtly stated case of *Mesa* v. *United States.*§

* 6 Howard, 81.
† Id. 112.
‡ Brown v. Duchesne, 19 Id. 183.
§ 2 Black, 721.

Mr. Stewart, contra: The objection is technical, and rests on a matter of form only. There is nothing specific in any act which would cause this case to be dismissed for laches; and nothing assuredly of any kind in the act under which the appeal is taken. If there was irregularity, it is waived by the admitted presence and presumable assent of the district attorney; with his confessed acknowledgment of notice

Reply: The question is not one of form, but is one of substance; of jurisdiction itself. Nothing that the district attorney did or could do, or that the attorney-general himself could, would give competence to the court, if under the acts of Congress the court has it not.

The CHIEF JUSTICE delivered the opinion of the court:

We have no jurisdiction of this appeal, unless it has been allowed by some act of Congress, and has been brought in substantial conformity with the legislative directions. The appellate jurisdiction of this court is, indeed, derived from the Constitution; but by the express terms of the constitutional grant, it is subjected to such exceptions and to such regulations as Congress may make.

In the Judiciary Act of 1789, and in many acts since, Congress has provided for its exercise in such cases and classes of cases, and under such regulations as seemed to the legislative wisdom convenient and appropriate. The court has always regarded appeals in other cases as excepted from the grant of appellate power, and has always felt itself bound to give effect to the regulations by which Congress has prescribed the manner of its exercise. We here use the word appeals in its largest sense, comprehending writs of error, and every other form in which appellate jurisdiction may be invoked or brought into action.

The acts of Congress providing for and regulating appeals have been often under the consideration of this court; and it may now be regarded as settled, that in the cases where appeals are allowed by the Judiciary Act of 1789, and the additional act of 1803, the writ of error, or the allowance of

appeal, together with a copy of the record and the citation, when a citation is required, must be returned to the next term of this court after the writ is sued out or the appeal allowed; otherwise the writ of error, or the appeal, as the case may be, will become void, and the party desiring to invoke the appellate jurisdiction will be obliged to resort to a new writ or a new appeal.*

In the case now before us, the rule just noticed was not followed. The appeal was allowed on the 11th November, 1864, and the allowance, with a citation to the adverse party, duly served, and a copy of the record, should have been sent here at the next term. This was not done, and the appeal, therefore, became void. The citation subsequently issued was consequently without avail, for there was no subsisting appeal.

The fact that the district attorney was present in court, cannot change this conclusion. We are not prepared to admit that the mere presence of counsel in court at the time of the allowance of an appeal, at another term than that of the decision appealed from, and without notice of the motion or prayer for allowance, would dispense with the necessity for a citation. Certainly it would have no greater effect; and in the case before us, a citation, even if issued and served contemporaneously with the allowance of the appeal, would have availed nothing, because of the omission to make the required return to the next term.

If this appeal, therefore, is to be disposed of under the acts of 1789 and 1803, as interpreted by this tribunal, it must be dismissed.

But it does not come before us under those acts.

It was allowed under the tenth section of the act of March 3, 1851, to ascertain and settle private land claims in the State of California, which authorizes the allowance of ap-

* United States v. Hodge, 3 Howard, 534; United States v. Villabolos, 6 Id. 90; United States v. Curry, Id. 112; Steamer Virginia v. West, 19 Id. 182; Insurance Co. v. Mordecai, 21 Id. 200; Mesa v. United States, 2 Black, 721.

peals on application to the District Court, and giving security, if required, for prosecution.

This act makes no provision concerning returns to this court, and none concerning citations; nor does it impose any limitation of time within which appeals may be allowed.

But we cannot suppose that Congress intended no regulation of these appeals in these important respects. It had already prescribed regulations for the most usual invocation of appellate jurisdiction; and when it provided for appeals in these land cases from the District Court for California, it had, doubtless, these regulations in view. We think, therefore, that the appeals authorized by this section must be regarded as appeals subject to the general regulations of the acts of 1789 and 1803. If we held otherwise, we should be obliged to sanction appeals taken at any term, and brought here at any time after final decision; or to confine the right of appeal to the term of the District Court in which the decision complained of was made. We cannot ascribe to Congress either intention.

The appeal before us, therefore, must be considered as having been made subject to those regulations, and must be dismissed for want of conformity to them by the appellant.

MOTION GRANTED.

THE BINGHAMTON BRIDGE.

1. Where a party to a suit sets up that under one statute a State made a contract with him, and that by a subsequent statute it violated the contract, and the highest court of law or equity of a State has held that such subsequent act was a valid act and decreed accordingly, the jurisdiction of this court under the 25th section of the Judiciary Act of 1789, attaches.
2. The statute of a State may make a contract as well by reference to a previous enactment making one, and extending the rights, &c., granted by such enactment to a new party, as by direct enactment setting forth the contract in all its particular terms. And a third contract may be made in a subsequent statute by importation from the previously im-

ported contract, in the former statute, and a fourth contract by importation from a third.

The doctrine applied by the court to a somewhat nice case before it.

3. An enactment by a State, in incorporating a company to build a toll-bridge and take tolls fixed by the act, that it should not be lawful for any person or persons to erect any bridge within two miles either above or below the bridge authorized, held to be within the case of the *Dartmouth College* v. *Woodward* (4 Wheaton, 625), and a contract inviolable; this though the charter of the company was without limit as to the duration of its existence.

4. A clause in a statute "that it shall not be lawful for any *person or persons* to erect a bridge within a distance of two miles" means, not only that no person or association of persons shall erect such a bridge without legislative authority; but that the Legislature itself will not make it lawful for any person or association of persons to do so by giving them authority.

THE legislature of New York was desirous in early times to have turnpike communications from the Chenango River, in the interior of the State, as the river approaches the Pennsylvania line, to the Hudson River at and below Newburgh, on that stream. Roads from the one river to the other by the routes contemplated had to cross the east branch of the Susquehanna, the east and west branches of the Delaware, and it was proposed also to make a bridge westward across the Chenango River itself. Accordingly, on the 6th of April, 1805, the legislature passed an act to establish a "turnpike corporation," as it was called, for these purposes. The act was a very long one—forty-two sections—and for the purpose of a subdivision of labor, created in fact some four or five corporations. Among them a company for the purpose of building, by subscription of capital, bridges over the *west* and *east* branches of the Delaware River, was incorporated by the name of "The President and Directors of the *Delaware* Bridge Company." The sections of the act relating to this company, fifteen in number, besides incorporating company *in form*, with the usual incidents, "continual succession," "suing," &c., gave it the right of purchasing, holding, and conveying any estate, real and personal, necessary to fulfil the end and intent of the corporation. They prescribed the mode of organizing the company, the kind of

bridge to be built, the places where toll-gates should be put, the amount of tolls to be taken after the judges of Delaware County should declare that the bridge was finished, the duty of care and superintendence of the bridge, and the penalty (forfeiture of charter) of neglect to repair or rebuild it if out of order or carried away; the punishment to be inflicted on any one who wilfully injured it, &c., &c.

Power was given to the directors to increase the stock of the company from time to time, after the original capital had been expended, as the exigency should in their judgment require, by assessments on the old shares, and to collect it, with a right of forfeiture of the old shares, if not paid, and shares in the corporation were made personal property.

The 31st section enacted:

"*It shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of Delaware River, within two miles either above or below the bridges to be erected and maintained in pursuance of this act.*" . . . "*Provided*, nevertheless," the act went on to say, "that nothing herein contained shall be construed to prevent any person, residing within two miles of the said bridges, from crossing the said river to or from his or her own house or land with his or her own boat or craft, without being subject to the payment of any toll."

An additional—the 36th—section provided that, at the expiration of thirty years, *the bridge should become the property of the people of this State.*

So far as regards the *Delaware* Bridge Company.

A subsequent part of the same act—its 38th section—incorporated another company—a single company—"The *Susquehanna* Bridge Company," for the purpose of erecting a bridge across the Susquehanna, at what was then called Oquaga, and since Windsor; and *also* for erecting a bridge at Chenango Point, the now village of Binghamton.

This section enacts, among other things, that the persons named, their successors and assigns,

"Shall be and are hereby created a body politic, and by the

name of 'The Susquehanna Bridge Company,' their successors and assigns *shall be and hereby are invested with all and singular the powers, rights, privileges, immunities, and advantages, and shall be subject to all the duties, regulations, restraints, and penalties which are contained in the foregoing incorporation of the Delaware Bridge Company; and all and singular the provisions, sections, and clauses thereof, not inconsistent with the particular provisions herein contained, shall be and hereby are fully extended to the president and directors of this incorporation.*"

The charters of these bridge companies—inserted, as already mentioned, in the body of the act incorporating the road—were prefaced by this preamble.

"Whereas, the foregoing road incorporation cannot be sufficiently carried into effect, or the public convenience fully promoted, if durable and permanent bridges across the Susquehanna and Chenango rivers, and the east and west branches of Delaware River, at the several places of intersection of the said roads, are not at the same time erected and maintained. And whereas, by reason of the great expense necessarily to be incurred in erecting and maintaining such bridges, on account of the size and rapidity of those streams, and the extraordinary freshets and frequent obstructions happening in those rivers, to which such bridges will be exposed, and which will endanger their permanency and durability, and may call forth a frequent renewal of the whole capital required for rebuilding such bridges, and therefore require a power (not contained in the foregoing incorporations) of calling from the stockholders, from time to time, such sums as shall be required for upholding such bridges, and which equally forbid the policy incorporated in the foregoing incorporations, that said property shall revert to the State; and whereas it is suggested that it will be most expedient for the purposes aforesaid to make two separate and distinct bridge incorporations, with powers adequate to the accomplishment thereof in the best possible manner. Therefore,

"*Section* 23. Be it enacted," &c.

On the 1st April, 1808, the Susquehanna and Chenango bridges not being yet built, *another* act was passed amendatory of the old one. It ran in substance thus:

"*Section* 3. *Be it enacted*, That the incorporation of the Susquehanna Bridge Company shall hereafter be deemed and considered to exist for the sole purpose of erecting and maintaining a toll-bridge, under their said charter, across the *Susquehanna* River at Oquaga, under all its present provisions, *except the limitation of its duration of thirty years, which said limitation shall be and hereby is repealed;* and that the time within which it shall be built shall be and hereby is extended to four years from the passing of this act.

"*Section* 4. *And be it further enacted*, That for the purpose of erecting and maintaining a toll-bridge across the *Chenango* River, at or near Chenango Point, the present stockholders of the *Susquehanna Bridge* Company, or such others as shall associate for that purpose, shall be and hereby are created a body corporate, in fact and in name, by the name and style of 'The *Chenango* Bridge Company,' and as such to have perpetual succession, under all the *provisions, regulations, restrictions, clauses*, and *provisions** of the before-mentioned Susquehanna Bridge Company."

Under this last section, several persons consociated themselves, in 1808, under the name of the *Chenango* Bridge Company, and built a toll-bridge at Chenango Point, *about one hundred rods above the point at which that stream merges itself and is lost in the larger and more important Susquehanna.*

In 1805, when the first act was passed, Chenango Point had but two or three houses, was a small place every way; hard, comparatively, of access; and with a surrounding region sparsely populated. Matters were not much different in 1808 when the second one was passed. In the course of fifty years, the condition of things had changed. Population had increased. The New York and Erie and other railways ran near the place. Villages had sprung up around. In 1854, several persons, "inhabitants of the village of Binghamton and its vicinity," presented a petition to the legis-

* This act of 1808, as given in the printed copies of the record before the court, read as given above with the word "provisions" inserted twice. In one of the opinions given below and submitted in the argument here, the act was cited as reading, "under all the provisions, regulations, restricting clauses, and provisions."

lature of New York, praying for the passage of an act authorizing an additional bridge. Their petition set forth:

"That the said village, situated at the confluence of the Susquehanna and Chenango Rivers, has a population of about ten thousand persons. That it covers the point between the rivers, and extends to the opposite side of both. That since the construction of the New York and Erie Railroad, which crosses the Chenango River about one mile from the mouth, the village has rapidly extended up said river, on both sides, and has largely increased, particularly upon the westerly side.

"They represent that the depots of all the railroads are on the easterly side of the Chenango, above where it is proposed to place the new bridge; that the said railroad depots occasion much travel to and from them, to and from the westerly side of the Chenango River, and that those who would cross in the vicinity of said depots are compelled to go nearly one-half mile down the Chenango River, and up it again on the other side, to and from the depots, thus losing nearly one mile of travel upon every such occasion. That a large volume of travel constantly passes over said old Chenango bridge, so great that it is frequently blocked up, by waiting for some to pay toll and otherwise, to the hindrance of travellers and citizens, and especially upon public days and funeral occasions. That all the churches, except the Catholic, are situated, and the principal business streets are upon the easterly side of the Chenango, and that the new, and hereafter to be principal public cemetery is situated upon the westerly side of the Chenango, about one mile above the old bridge. That the river is subject to high freshets and ice floods, and that in case the present bridge across the Chenango should be carried away there would be no means but a railroad bridge, where travel is not permitted, of reaching said churches, nor the business street from the westerly side of the Chenango, or the cemetery from the easterly side, nor could numerous citizens who reside upon the westerly side of the Chenango reach their places of business. That by reason of the great amount of travel over the present bridge and other causes it is frequently out of repair, so that only one side of it can be used, and at such times it is passed only with great delay and difficulty."

The legislature of New York accordingly, by "An act to incorporate the Binghamton Bridge Company," passed April 5, 1855, granted a charter to another bridge company, who built a bridge a few rods above the old one. This greatly diminished and seemed likely to destroy its tolls, which had been for a long time profitable.

The old bridge company now accordingly filed a bill in the Supreme Court of New York to enjoin the new rival.

The bill—resting itself, of course, on the postulate that the rights given by the act of 1805 to the Delaware Bridge Company were imported by the 88th section of it into that of the Susquehanna Company of that act; that these again, thus imported, were translated (with the thirty-years restriction only thrown off) into the third section of the act of 1808, and that these last were carried finally into the fourth section of this new act—insisted that these various enactments made an "absolute, unconditional, and unlimited *contract*" with them that no bridge should ever be built over the Chenango River within two miles of theirs, either above or below it.

The answer denied the contract set up.

The Supreme Court of New York dismissed the bill. On appeal, the Court of Appeals, the highest court of the State of law or equity in which a decision of the matter could be had, affirmed the decree. The case was now brought here for review; the matter coming here, of course, under the 25th section of the Judiciary Act of 1789, which provides that a final judgment or decree in the highest court of law or equity in a State, "where *is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of such validity*, may be examined and reviewed in this court;" and the allegation being that the act of April 5, 1855, incorporating the new bridge company, was contrary to that clause of the Constitution of the United States which ordains that "no State shall pass any law impairing the obligation of contracts."

The certificate from the Court of Appeals declared that

the question raised by the Chenango Bridge Company, appellants in the case was:

"That the said act of April 5, 1855, was repugnant to the Constitution of the United States; and the question decided by this court, *in order to induce the judgment of this court*, was, that the said act of April 5, 1855, was not repugnant to the Constitution of the United States, and that said act of April 5, 1855, is held valid and binding by this court, notwithstanding said act was drawn in question in this cause, and the question clearly raised therein that said act was void as aforesaid."

It was then "ordered that the record and proceedings be remitted to the Supreme Court," here to be proceeded upon according to law.

Three questions were made here:

1st. A preliminary one, not very much pressed, whether the certificate gave this court jurisdiction under the 25th section of the Judiciary Act?

2d. Did the acts of 1805 and 1808 give the complainants an exclusive and perpetual privilege against anybody; either individuals or legislature?

3d. Supposing that under the expression "it shall not be lawful for any *person or persons* to erect any bridge" it gave them such privilege as against individuals, did it give them such right as against the legislature also?

[To understand fully the argument on this third point, it must be stated, that it was assumed in the argument by the Chenango company's counsel, and was stated as a fact in some of the opinions below, that in 1797 an act was passed providing for the opening and construction of highways and *bridges*, by superintendents and commissioners of highways; and that in the same year provision was made to authorize and regulate ferries within the State—forbidding the establishing and use of any ferry, for profit and hire, unless duly authorized, and conferring authority upon the courts of common pleas in each county of the State to grant licenses for keeping ferries, as many and to such persons as the court shall think proper.]

Mr. D. S. Dickenson, for the Binghamton Bridge Company, and against the jurisdiction and exclusive privileges.

I. Whatever the certificate may state, it is obvious that the real question below was whether the acts of 1805 and 1808 made a contract exclusive as against the State. Supposing such a contract, there could be no doubt that the act of 1855 impaired it. The decision below was that they did not make it. The decision then was an adjudication of a State court upon a statute of the State; and construing it. Such a case is not one within the 25th section. It may be said, however, that this point has been otherwise adjudicated in *Bridge Proprietors* v. *Hoboken Company.** If that is so, there remain other grounds for dismissing the case.

The certificate states that "*in order* to induce the judgment of *this*" (the Supreme Court of the United States), the question decided below, was thus and so. Can cases thus be decided in a particular manner, for the purpose of bringing them here, under the 25th section, and then be *certified* into jurisdiction? The purpose of the act was not to have anything brought here which was not decided for the purposes of justice in the case; cases decided merely to get a review by this tribunal, however decided, are not proper matters for its jurisdiction. Jurisdiction cannot be "manufactured," and authority thus given, even to this court, to review the legislation and judicial proceedings of a State, which ordinarily belong to the State courts alone, and should rest there.

II. We concede that the legislature may, by a clear manifestation of its intention to do so, make dispositions of matters which are proper subjects of its disposition. It may sell all which is the subject of bargain. But its sovereignty cannot be vended *in perpetuo*. One legislature cannot place the sovereignty of the State or any portion of it beyond the reach of all succeeding ones.

A disposition of that in which the supremacy of government rests, is an assumption of power not legislative in its

* 1 Wallace, 116.

nature and is void. The legislature here has disposed of the right of passing a great river for four miles. If it can dispose of it for four miles, it can do so for a hundred, and when the principle is admitted, what is to curb it but the slender rein of legislative discretion? The Chenango, from its source to its mouth, is nearly a hundred miles in length. If the legislature had extended the restriction over the whole, the question in all its legal relations would have been the same. This shows to what point the doctrine leads. A State is the guardian, not the broker of its people's rights; the protector, not the auctioneer of their property. It is invested with great and awful powers, and must necessarily be so; but among them all there is no power to oppress.*

The Dartmouth College case may perhaps be invoked against these views and in support of the pretensions of the other side. If it sustain such pretensions—grants of the State sovereignty from the control of successive legislatures forever—we deny its authority in this day.

But in truth there is no relation whatsoever between it and the case at bar. In the college case a royal charter had been granted to a number of persons, incorporating them as a religious and literary institution. Large donations were made to it. It had the power to fill vacancies in the board of its trustees, to manage its funds, &c. The legislature largely increased the number of trustees, and provided a different mode for the appointment of persons to have charge of the trust funds, &c. The court found no difficulty in holding that a contract had been made and its obligations violated. But suppose that the charter had said "it shall not be lawful to erect any other college in New Hampshire," would such an enactment—in injury of education and of public right *forever*—have been held binding?

If the provident principles of government which we have asserted be questioned, the principle of law will not be ques-

* See this matter strongly put by counsel, *arguendo*, in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wallace, 181.—REP.

tioned, that all statutes which seek to abridge the power of legislation, to prohibit the exercise of common-law right and oppress the people, which confer monopolies or impose restraints or penalties, are to be construed strictly against those asserting the exclusive right and favorably for the public. The rule is one that has been imbedded from early days in the English law.* It has been declared with force, by Sir William Scott† and by Lord Tenterden,‡ as existing equally in these.

Now "it would present," as Taney, C. J., said, in a well-known case,§ "a singular spectacle, if while the courts of England are restraining within the strictest limits the spirit of monopoly, and exclusive privileges in the nature of monopolies, and confining corporations to privileges plainly given them in their charter, the courts in this country should be found enlarging these privileges by implication, and construing a statute more unfavorably to the public and to the rights of the community than would be done in an English court of justice." There, after premising that those who accept charters have full opportunity to examine and consider the provisions before they invest their money, he adds: "And if individuals choose to accept a charter in which the words are susceptible of different meanings; or might have been considered by the representatives of the State *as words of legislation only*, and subject to future revision and repeal, and not as words of contract; the parties who accept it have no just right to call upon this court to exercise its high power over a State upon doubtful or ambiguous words, nor upon any supposed equitable construction or inferences based upon other provisions in its acts of incorporation."

In *Dartmouth College* v. *Woodward*,‖ Marshall, C. J., says: "On more than one occasion this court has declared, that in

* See authorities cited by counsel *arguendo*, in Bridge Proprietors v. Hoboken Co., 1 Wallace, 134. † Ib.

‡ Stourbridge Canal Co. v. Wheeley, 2 Barnewall & Adolphus, 793.

§ The Charles River Bridge v. The Warren Bridge, 11 Peters, 544.

‖ 4 Wheaton, 625.

no doubtful case would it pronounce a legislative act contrary to the Constitution."

In a great Pennsylvania case,* Black, C. J., says: "When the State means to clothe a corporate body with a portion of her sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said. In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending privileges, let the legislature see to it, but remember that nothing but plain English words will do it."

Now, considering this question by the light of these general principles of government, or even by the general principles of the more restricted science of municipal law, has there been a perpetual exclusion of right, even as against individuals, to build?

The view taken by the Chenango Bridge Company is set out (*supra*, p. 57). It need not be here repeated. But we deny that the "exclusive right," whatever it may have been, in the Delaware charter, could have been extended to the Chenango bridge by any phraseology, such as the claim here rests on.

It will be observed (*supra*, pp. 52–3), that in incorporating the *Delaware* company, the act of 1805 sets forth the grant of the usual corporate powers specifically. These themselves—continual succession, suing, &c., are, we submit, "powers, rights, privileges, immunities, and advantages." But the act gives to the Delaware company not only these "powers, rights, privileges, and immunities," usually incident to corporations, but it gives, also, a right to purchase, hold, and *convey real estate;* not an incidental right to the creation of a corporation as such; and, over and above this, a power to the directors *to increase the stock indefinitely*, and to enforce payments for new stock by forfeiting old. When the *Susque-*

* Pennsylvania Railroad Company v. Canal Commissioners, 21 Pennsylvania State, 22.

hanna company comes to be incorporated by a subsequent section, the act does not proceed again *in extenso*, and give to it all these things; but says that the new company is invested with the powers, privileges, immunities, and advantages, &c., of the former company. This, of itself, we presume, would be conceded to be insufficient to give the exclusive privilege of the two miles; for the expression can be fed by the already mentioned ordinary and extraordinary powers given to the Delaware company. The right set up must rest upon the fact that the "provisions, *sections*, and *clauses*, not inconsistent," &c., contained in the incorporation of the Delaware company in the act of 1805, are "extended" to the second one, the Susquehanna company, of that same act. Still we submit that the intention was but to invest the Susquehanna company with the powers, rights, and privileges pertaining to a bridge corporation, as such, and similar to those which had just been given to the Delaware company; subjecting it to like duties, regulations, and restraints. All the provisions of the act in respect to the Delaware Bridge Company which related to its corporate powers; the manner of organization; the kind of bridge to be erected, and when to be completed; the right to erect gates at either end of the bridges, and demand and receive tolls; the neglect to repair or rebuild, which was to work a forfeiture of the charter; the duties enjoined in respect to the care and superintendence of the bridges, and the penalties imposed and to be enforced, were made applicable to the Susquehanna Bridge Company, and the section incorporating *it* should read as though these provisions were literally embodied in it also. The expression, too, "are fully *extended* to it," is peculiar. The provisions, clauses, &c., of the first company's charter are not declared to be made part of the second company's also (which it is here contended that by the expression used they were made); but are only "extended" *to* it. Is it not plain that language was used in the act—drawn, we may assume with certainty, by the agents of the corporations—which did not express in a clear manner that that was granted which it is now pretended was granted?

But this clause about the two miles, the prohibitory clause, in the Delaware charter, expressly includes the east and west branches of the Delaware; *two* branches, therefore. The Chenango River is but a single stream, and this clause, therefore, must be regarded as "inconsistent and inapplicable" to *it*. This clause was inapplicable in another respect. The Chenango River extended but about one hundred rods below the point where the plaintiffs contemplated erecting, and where they did actually erect their bridge. The grant, therefore, as construed by the Chenango company, assumes that the river was of one kind, when it was in fact of another, bifurcated when it was single; and assumes, also, as a fact, that which was neither a fact nor a physical possibility, while the rivers ran together as nature made them do.

Conceding, however, that, under the act of 1805, the restrictive clause did apply for thirty years; we deny that it ever applied at all to the new Chenango Bridge Company, under the act of 1808. Under this last act, the former Susquehanna Bridge Company is divided into two companies; one, with the old name, to build a bridge across the Susquehanna; another, with the name of the Chenango Bridge Company, to build a bridge across the Chenango. Let us con-column the language of the old and new charters, as respects the Susquehanna company.

UNDER THE OLD CHARTER, 1805.	UNDER THE NEW CHARTER, 1808.
The Susquehanna Bridge Company is hereby invested "with all and singular the *powers, rights, privileges, immunities*, and *advantages*, . . . which are contained in the foregoing incorporation of the Delaware Bridge Company; and all and singular the PROVISIONS, sections, and clauses thereof not inconsistent with the particular provisions herein contained, shall be and hereby are fully extended to the president and directors of this corporation."	The incorporation of the Susquehanna Bridge Company shall hereafter be deemed and considered to exist for the sole purpose of erecting and maintaining a toll-bridge, under their said charter, across the *Susquehanna* River, at Oquaga, under all its present PROVISIONS, *except the limitation of its duration of thirty years, which said limitation shall be and hereby is repealed.*

Not a word in the new charter about either "powers, rights, privileges, immunities, or advantages." The new

company exists under the old "provisions" only. Even the terms "sections and clauses" are omitted. In existing with this word "provisions," it exists with the same word which in the former charter was coupled with the words, "powers, rights, privileges, immunities, and advantages;" as also with the words, "sections and clauses;" and which in that former act, of course, were used to express something more and other than is expressed by the term "provisions." When we come to the section under which the Chenango Bridge Company is incorporated, it is worse for the complainants' cause even than this. Again let us con-column:

SUSQUEHANNA BRIDGE COMPANY, 1808.	CHENANGO BRIDGE COMPANY, 1808.
"The incorporation of the Susquehanna Bridge Company shall hereafter be deemed to exist for the sole purpose of erecting and maintaining a toll-bridge, under their said charter, across the Susquehanna River, at Oquaga, under all its present *provisions*, except the limitation of its duration of thirty years."	The present stockholders, &c., or such others, &c., "are created a body corporate, by the name of the Chenango Bridge Company, and as such have perpetual succession, under all the provisions, *regulations*, *restrictions*, clauses, and provisions of the before mentioned Susquehanna Bridge Company."

Everything like the valuable old "powers, rights, privileges, immunities, and ADVANTAGES" gone! clean gone! "Regulations," restrictions, clauses (or restrict*ing* clauses?), and provisions have assumed their place; and the term "provisions," to which these restrictive expressions are added, remains the forlorn hope of a monopoly. Now, though the word "provision" is sometimes used as synonymous with enactment, it is not philologically so used well. In its true meaning it expresses restriction. It comes from *pro*, before, and *video*, to see; and implies foresight; prudence with respect to futurity; a sense inconsistent with granting away *forever* the right of a whole people to cross a stream running through one of the best and most populous parts of a great State, and to the increase in population of which no limits could be fixed; a sense equally inconsistent with that of its consociated terms—"regulations, restrictions, clauses (or restrict*ing* clauses and provisions?)," its

companions in phraseology; *companions*, by whom words as well as people are often best known.

We insist, too, that the Chenango company was modelled after the *then existing Susquehanna company*—the Susquehanna company of the act of 1805—and not after it as the *bill pending proposed to make it.* The "regulations, restrictions," &c., of the Susquehanna company, under which the Chenango company was incorporated, were thus the legal, existing regulations and restrictions upon the statute-book, *including the thirty years' limitation.* The expression, "before mentioned Susquehanna company," used in the act of 1808, and subject to whose provisions, regulations, &c., the new Chenango company was incorporated, does not mean the Susquehanna company as the proposed act designed to make it. That might be true, if there had never yet been any such company as the Susquehanna company; but it would be true only because the expression could not otherwise be satisfied. But here there was already existing a completely organized and well-known company of that name, subject to provisions, regulations, &c., *in esse* and *defined.* Thus construed, the act of 1808, as to these charters, would read as follows: "The Chenango company shall be made as the Susquehanna company now is by law. The thirty years' limitation, now on the charter of the Susquehanna, is hereby repealed."

If this is so, instead of having a monopoly, the Chenango bridge has for the last twenty years been the property of the people of New York; has for all that time been imposing its exactions upon travel by usurpation; and its corporators now, instead of seeking to prevent and destroy other facilities for transit, demanded by public convenience, and to levy contributions upon wayfarers through all time, should be answering a *quo warranto*, filed by the attorney-general, and refunding to the people the tolls its corporators have collected without right.

It must be remembered that the legislative provision which the Chenango company set up as a "contract," was originally placed in the Delaware charter, when its duration was limited, in a separate section, to *thirty years;* that the

Susquehanna charter was borrowed from the Delaware charter, *the thirty years' limitation included;* that, as contended by the complainant in error, by a single stroke of subsequent legislation, the Chenango charter was spoken into its present existence; that both the Susquehanna and Chenango charters, in this same bill, gained separate and independent being; that they severally retained the exclusive right of the Delaware charter for "two miles above and below" their bridges to be constructed respectively, &c., and that both and each *escaped from the limitation* together, and gained an eternity of existence and an endless contract!

Does any one believe that any such thing was understood by the legislature? Does not this importation and reimportation of legislative enactment, so strangely carried out to make a contract, have the aspect of contrivance to obtain a contract without the legislature being aware that one was given? Why are the plain words of the earlier act—"powers, rights, privileges, immunities and advantages"—departed from, and the whole attempted to be got in under the term "provisions," &c.? Has there been any want of clear and round dealing on the part of the Chenango company? If the contract set up has been made by what Rogers, J., in the Pennsylvania case of *Lambertson* v. *Hogan*,* called "the covert design of the draughtsman," the observations of that judge in that case may be referred to for the weight that is due to the enactment. Certainly, at least, this legislative phraseology, called a contract, coming down to the Chenango charter under such circumstances—such a multiplicity of provisions, mixed up with near half a dozen corporations, some coming, some going—such a confusion of legislative tongues—such a jargon of tangled phrases—present reasons why the language set up as a contract should, in its application to the Chenango charter, and in its meaning, if placed there, be read with more than ordinary care, and be construed according to the strictest rules relating to legislative contracts and perpetual monopolies.

* 2 Pennsylvania State, 24.

Supposing, however, that the phrase, "it shall not be lawful," &c., does apply to the Chenango bridge, does it make a contract? Is it not mere legislative enactment, subject to repeal like any other statute? It has neither consideration, nor mutuality, nor form, nor substance, nor any other element of a contract. The words, indeed, are as common in legislation as the words "be it enacted" and "be it further enacted." The phrase "it shall be lawful," or "it shall and may be lawful," and "it shall not be lawful," may be found upon almost every page of our statute and session laws, commencing with our colonial legislature and coming down to the last session. The former phrase runs through the entire act now under consideration. One is employed to grant liberty to *any person* or *persons*, and the other to restrain them. So these phrases are employed and understood. The State by the expression used but incorporates the petitioners with certain rights, and authorizes them to erect and maintain a bridge and collect tolls, and volunteers a provision that competition within two miles shall not be lawful. The corporators neither pay, nor agree to pay anything; they neither do nor agree to do anything in consideration of the charter. They may erect a bridge or not erect it; when erected they may maintain it or not maintain it; if destroyed by decay or casualty, they may re-erect or not re-erect as they choose; in short, the corporators are not bound to do anything. They were not bound to erect it originally, and may now abandon it any day, and at their own convenience or caprice, regardless of the public interests or wishes. Should it be carried away by flood or destroyed by fire or become wasted by decay and be suffered to remain, what adequate remedy would the people of the State have upon their side of the "contract?" and what would be the *form of action?*

III. But conceding that it was "*not* lawful for any *person* or *persons*," of their own right or by authorization from the county boards or courts to erect a bridge over this stream within two miles of the complainants' bridge above or below

that of the complainants', does the legislature bind and prohibit *itself* from erecting a bridge, both directly and by delegation through charter to others?

The Chenango, as is matter of common knowledge, is a fresh-water stream, where the tide does not ebb and flow,—not navigable except for arks and rafts in freshets, and was to all intents and purposes a *private river*, subject to the public easement as a highway. The riparian proprietors might establish bridges or ferries at such points as they pleased, unless restrained by legislation; and, the statutes of New York, as early as 1797, had authorized the construction of highways and bridges by *superintendents and commissioners;* had forbidden the use of ferries for hire, unless duly authorized, and had given *courts of common pleas* power to license them at such points as they might think proper. The provision of the 31st section, in the charter, declaring that it should not be lawful for any person or persons to erect any bridge or establish any ferry within two miles of the bridge, &c., applied to the superintendents and commissioners of highways, and to the courts of common pleas, and to private persons. And that this is so is shown by the *proviso* to the 31st section, excepting *persons residing within two miles* of the said bridges and crossing to or from their own land in their own boats. There were thus sufficient persons and officers and public authorities to satisfy fully the restriction clause in the section without extending its operation to the State or to the legislative authority. For without the provision, the superintendent of highways for the county, and the commissioners of highways of the town and towns contiguous to the Chenango River, might have laid out highways and constructed bridges across the river at such places as they deemed proper; and the court of common pleas might have allowed ferries to be established across the same, so as entirely to destroy the plaintiffs' franchise.

That such enactments as this one—there being no exclusion of the power of the legislature—operate to exclude *individuals and corporations* only,—that they do not prohibit the legislature from the exercise of *its* sovereign authority in

granting further facilities when required by public necessities, and that the enactment may be repealed and modified at the pleasure of the legislature, has been adjudged in numerous cases in New York. We present one, *Thompson* v. *New York and Harlem Railroad Co.*,* decided by one of the best equity lawyers in New York. In that case the plaintiff's charter contained a clause like that of the Chenango bridge charter, declaring that "it shall not be lawful for any person or persons *whatsoever* to erect or cause to be erected," &c. The defendants erected a bridge under a subsequent act of the legislature within the prescribed limits, and upon bill filed for relief, Vice-Chancellor Sandford, upon a review of all the cases held, that the act of giving the plaintiffs charter "did not declare that the *legislature* would not permit the erection of another bridge," &c., and that it might lawfully grant the new charter. Other cases are to the same point.†

Cases may, no doubt, be found in this and other States, where it has been held, that when the legislature had made a contract in terms *excluding itself from authorizing* a rival work within defined limits, that a law authorizing such rival work within prescribed limits would be unconstitutional, and that the privileged corporation could have relief against it in equity. Such was *The Boston & Salem Railroad* v. *The Salem & Lowell Railroad.*‡ The legislature, as Shaw, C. J., declares, there put in plain terms a restraint on itself.

But not one case of respectable authority can be found, which holds that a legislative contract, disposing of a State's sovereignty, can be recognized by implication from a series

* 8 Sandford's Ch. 625.

† See Mohawk Bridge Co. v. The Utica and Schenectady Railroad, 6 Paige, 554; Lansing v. Smith, 4 Wendell, 9; Oswego Falls Bridge v. Fish, 1 Barbour's Chancery, 547; all in point. On the general subject, see Charles River Bridge v. Warren Bridge, 11 Peters, 544; East Hartford v. Hartford Bridge Co., 10 Howard, 511; West River Bridge Co. v. Dix, 6 Id. 529; Tuckahoe Canal v. James River, 11 Leigh, 42; Gould v. Hudson River Railroad, 2 Selden, 522.

‡ 2 Gray, 9.

of tangled phrases, doubtfully expressed, perhaps artfully contrived; or that mere every-day legislative phraseology constitutes a contract.

We have denied (*supra*, p. 59) that a contract to surrender the sovereignty of the State forever could, under any form, be enacted by legislation that will bind for future time the State's representatives. To that view we hold. If, however, courts will but adhere to their own salutary precedents, so often laid down—and from the facility with which great franchises are now obtained from our legislators by designing men, becoming every day more salutary—not to spell out of language, suitable and intended for mere legislative enactments, contracts which sap the foundation of common rights, fetter the State, and make her the servant of her own creation—the evil done by anything that is actually enacted will probably be small.

The complainants have no doubt suffered loss. But it is not every loss suffered that gives a remedy. There is a very ancient head of the law known as *damnum absque injuriâ;* and it is precisely that loss which these complainants have encountered.*

Mr. Mygatt, contra.

Mr. Justice DAVIS delivered the opinion of the court.†

The Constitution of the United States declares that no State shall pass any law impairing the obligation of contracts; and the 25th section of the Judiciary Act provides, that the final judgment or decree of the highest court of a State, in which a decision in a suit can be had, may be examined and reviewed in this court, if there was drawn in question in the suit the validity of a statute of the State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The plaintiffs in error brought a suit in equity in the Supreme Court in New York, alleging that they were

* Radcliff's Executors v. The Mayor of Brooklyn, 4 Comstock, 195.

† Nelson, J., not sitting, being indisposed.

created a corporation by the legislature of that State, on the first of April, 1808, to erect and maintain a bridge across the Chenango River, at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge; which was a grant in the nature of a contract that cannot be impaired. The complaint of the bill is, that notwithstanding the Chenango Bridge Company have faithfully kept their contract with the State, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the fifth of April, 1855, in plain violation of the contract of the State with them, authorized the defendants to build a bridge across the Chenango River within the prescribed limits, and that the bridge is built and open for travel.

The bill seeks to obtain a perpetual injunction against the Binghamton Bridge Company, from using or allowing to be used the bridge thus built, on the sole ground that the statute of the State, which authorizes it, is repugnant to that provision of the Constitution of the United States which says that no State shall pass any law impairing the obligation of contracts. Such proceedings were had in the inferior courts of New York, that the case finally reached and was heard in the Court of Appeals, which is the highest court of law or equity of the State in which a decision of the suit could be had. And that court held that the act, by virtue of which the Binghamton bridge was built, was a valid act, and rendered a final decree dismissing the bill. Everything, therefore, concurs to bring into exercise the appellate power of this court over cases decided in a State court, and to support the writ of error, which seeks to re-examine and correct the final judgment of the Court of Appeals in New York.

The questions presented by this record are of importance, and have received deliberate consideration.

It is said that the revising power of this court over State adjudications is viewed with jealousy. If so, we say, in the words of Chief Justice Marshall, "that the course of the

judicial department is marked out by law. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it." The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was, that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken, in the unshaken belief that it will never be forsaken.

A departure from it *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the Government. An attempt even to reaffirm it, could only tend to lessen its force and obligation. It received its ablest exposition in the case of *Dartmouth College* v. *Woodward*,* which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine, that the charters of private corporations are contracts, protected from invasion by the Constitution of the United States. And it has since so often received the solemn sanction of this court, that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

The principle is supported by reason as well as authority. It was well remarked by the Chief Justice, in the Dartmouth College case, "that the objects for which a corporation is created are universally such as the Government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration for the grant." The purposes to be attained are generally beyond the ability of individual enter-

* 4 Wheaton, 418.

prise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on Government to provide for them; and as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: "If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill." Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.

It is argued, as a reason why courts should not be rigid in enforcing the contracts made by States, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

If the knowledge that a contract made by a State with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and care on the part of law-makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere.

A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambi-

guity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the Charles River bridge,* the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the State, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way. The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts. What, then, are the rights of the parties to this controversy?

In 1805 the State of New York passed an act, in forty-two sections, creating five different corporations. The main purpose of the act was, at that early day, to secure for the convenience of the public good turnpike roads; but the country was new; the undertaking hazardous; the roads crossed large and rapid streams, and the legislature, in its wisdom, thought proper to create two separate and distinct bridge incorporations, with larger powers than were conferred on the turnpike corporations.

* 11 Peters, 544.

The preamble to the 28d section declares the motives and purpose of the legislature. Heavy freshets and dangerous obstructions to which the streams were subject seemed likely to endanger the permanency of the bridges, and to require frequent renewals of the whole capital; and it was thought but just that the corporations for erecting the bridges should be relieved from the policy of reversion, which attached to the corporations for constructing the turnpike roads, and that full powers, adequate to the execution of the work in the best manner, should be assured to those citizens who would successfully accomplish the building of the bridges. It is impossible to read this recital, and escape the conclusion that the legislature thought the enterprise did not promise present remuneration, and that large powers and exclusive privileges must be given, to get the stock taken and the bridges built. It is evident that what was then considered a great scheme of internal improvement, was in the mind of the legislature. Such a scheme was, at that early period in the history of the State, not of easy solution. It required more energy and foresight, and involved greater hazard, in the commencement of this century, to build turnpike roads through an unbroken wilderness, and erect bridges over dangerous streams, than it would *now* to checker the surface of a State with railways. These considerations are great helps, in arriving at a correct knowledge of the intention of the legislature, and in giving a proper construction to the grants that were made. For it should never be lost sight of, that the main canon of interpretation of a contract, is to ascertain what the parties themselves meant and understood. In order to connect the turnpike roads, it was necessary to cross the east and west branches of the Delaware, the Susquehanna, and Chenango rivers. These streams were all in the same category. The work of improvement was incomplete until each was spanned with substantial bridges; and there is nothing to show that the dangers apprehended, and which formed the inducements to the grant of large powers, did not apply to all of them alike. Fifteen sections of the act are devoted

to the creation of the Delaware Bridge Company, for the purpose of erecting bridges over the east and west branches of the Delaware River, with the usual faculties, powers, and incidents of a corporation, and subject to the usual duties, regulations, restraints, and penalties. The duration of the company was limited to thirty years, and competing bridges or ferries, within the prescribed limits of two miles above and below, were forbidden. These were important privileges, and justified by the peculiar circumstances of the country; and it is easy to see that without them prudent men would not have engaged in the enterprise. The Delaware Bridge Company having been constituted with great minuteness of detail, a few words and a single section sufficed to bring into existence the Susquehanna Bridge Company. The thirty-eighth section of the act created the latter corporation, to erect and maintain toll-bridges across the Susquehanna and Chenango rivers, at certain localities; and further, declared that the "Susquehanna Bridge Company be, and hereby are, invested with all and singular the powers, rights, privileges, immunities, and advantages, and shall be subject to all the duties, regulations, restraints, and penalties which are contained in the foregoing incorporation of the Delaware Bridge Company; and all and singular the *provisions*, *sections*, and *clauses* thereof, not inconsistent with the particular provisions therein contained, shall be, and hereby are, fully extended to the president and directors of this corporation."

No one can read the entire act through, and fail to perceive that the legislature *intended* to create two bridge incorporations, exactly similar in all material respects. Protection was alike necessary to both; the public wants required both; the scheme of improvement embraced both; the danger of present loss applied to both; and there were the same motives to give valuable franchises to both.

The inquiry, then, is, has the legislature used language that clearly conveys that intention? and on this point we entertain no doubt.

It is not questioned that the provision limiting the Dela-

ware charter to thirty years was carried into the Susquehanna charter; but it is denied that the prohibition against competition was also imported.

The clause in the Delaware charter on that subject is in the following words: "that it shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of the Delaware River, within two miles, either above or below the bridges, to be erected and maintained in pursuance of this act." This was, undoubtedly, a covenant with the Delaware company that they should be free from competition within the prescribed limits. It is argued, because the east and west branches of the Delaware are named, that the prohibition was not intended to reach the Susquehanna company. But this construction is narrow and technical, and would defeat the very end the legislature had in view. It is true there were certain minor provisions in the Delaware charter which were peculiar to it, and of course it would be absurd to suppose that they were transferred, or intended to be transferred to the Susquehanna company; but, by the terms of the law, whatever provisions were applicable, were extended to the latter company. It is easy to see that the legislature never meant that the judges of Delaware County, who were to visit and inspect the Delaware bridges, should also visit and inspect the Susquehanna, because there were similar officers in Tioga County, where the Susquehanna bridges were located. But the privilege against competition was applicable to both corporations, and, in the unsettled state of the country, necessary to the existence of both, for the legislature well knew, that it would be madness for adventurers to build toll-bridges in a new country, where travel was limited and settlers few, if the right was retained to authorize other adventurers to build other bridges, so near as to divide even that limited travel. The form adopted in making the grants has weight, in arriving at the true legislative intention, and it is worthy of consideration, that it is not unusual in the legislation of this country to grant vast powers in a short act, by rererring to and adopting the provisions of other

corporations, of like purposes. In fact, some of the great enterprises of the day have sprung into existence and distributed their blessings by virtue of legislation similar to that which created the Susquehanna Bridge Company. The object is apparent, not to encumber the statute-book by useless repetition and unnecessary verbiage. The legislature of New York, at great length, and with commendable care and circumspection, incorporated the Delaware company, and then, to avoid repetition, gave to the Susquehanna company all the rights and advantages which, in the same act, were conferred on the Delaware corporation. *This was enough;* but in fear of cavil, and to avoid any misconstruction, and out of superabundant caution, it was declared that all the provisions, sections, and clauses in the Delaware charter, not *inconsistent* with the particular provisions of the Susquehanna charter, should be fully extended to the president and directors of the latter corporation. There were no inconsistencies between the two corporations, except such as would arise from difference in *locality*, and in every other respect the corporations were alike. Each was to bridge two streams, and each needed, and did receive the fostering care of the legislature. When it is conceded, as it must be, that a franchise which prohibits competition is an advantage, and that it was enjoyed by the Delaware company, and that there is nothing in the peculiar provisions of the Susquehanna charter which prevents that company from enjoying it, then it is conferred, and there is an end to controversy.

The history of the subsequent legislation of the State, on the subject of these bridges, is explanatory of the intention of the legislature of 1805, and confirmatory of the view already taken. In 1808, the Susquehanna and Chenango bridges were not built, and longer time and greater privileges were required to insure the success of that enterprise. The legislature, in fear that the scheme of internal improvement, which was not complete without the bridges, would fail, furnished still greater inducements to the parties proposing to erect them. The thirty years limitation was repealed, and the charter made perpetual, and the time limited

for building the bridges was extended four years. And these provisions of the Susquehanna charter, which were thus altered, and treated by the legislature of 1808 as belonging to it, were, if part of it, imported from the Delaware charter. Can it be supposed, when the Susquehanna company was demanding higher privileges in order to *live*, that it was the intention of the legislature to deprive it of the right to shut out competition, with which the Delaware company was invested, and which was nearly as valuable as the right to take tolls?

The intention of the legislature was manifest to confer on the Susquehanna corporation all the advantages enjoyed by the Delaware company that were applicable to it, and consistent with the different locality it occupied; and the language used, in our opinion, gives effect to that intention: and the two-mile restriction is as much a part of the charter of the Susquehanna company, as if it had been directly inserted in it. It is argued that the restriction cannot apply to the Chenango bridge, because it is located less than two miles from the confluence of the Chenango River with the Susquehanna. But the restriction is for two miles, either above or below the bridges, and is applicable to a bridge built above and within the prohibitory limits, although a question might arise, whether it was extended to a bridge which was built below the junction of the streams. The Susquehanna company, by the original charter, was to erect bridges over both the Susquehanna and Chenango rivers; but, with the amendments which were made in 1808, it was declared to exist for the sole purpose of building and maintaining a bridge over the Susquehanna, while at the same time the privilege of bridging the Chenango was given to "The Chenango Bridge Company," a new corporation, created with the same faculties and franchises, and subject to the same duties and restrictions as the Susquehanna corporation.

The construction which has been given by us to the Susquehanna charter is necessarily a solution of all questions pertaining to the charter of the Chenango Bridge

Company. The legislature, therefore, contracted with this company, if they would build and maintain a safe and suitable bridge across the Chenango River, at Chenango Point, for the accommodation of the public, they should have, in consideration for it, a perpetual charter, the right to take certain specified tolls, and that it should not be lawful for any person or persons to erect any bridge, or establish any ferry, within a distance of two miles, on the Chenango River, either above or below their bridge.

Has the legislature of 1855 broken the contract, which the legislatures of 1805 and 1808 made with the plaintiffs?

The foregoing discussion affords an easy answer to this question. The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for "it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription time out of mind, or a charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use; and every ferry ought to be under a public regulation."* As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," *is*, that the legislature *will not make it lawful* by licensing any person, or association of persons, to do it. And the obligation includes a free bridge as well as a toll bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection

* Hargrave's Law Tracts, ch. ii, 16; The Enfield Toll Bridge Co. *v.* The Hartford and New Haven Railroad Co., 17 Connecticut, 63; Hooker *v.* Cummings, 20 Johnson, 100; Bowman v. Wathan, 2 McLean, 383.

of a bridge which should be free to the public. The Binghamton Bridge Company was chartered to construct a bridge for general road travel, like the Chenango bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract which the legislature made with the Chenango Bridge Company, and as such a contract is within the protection of the Constitution of the United States, it follows that the charter of the Binghamton Bridge Company is null and void.

DECREE of the Court of Appeals of New York reversed, and a mandate ordered to issue, with directions to enter a judgment for the plaintiff in error, the Chenango Bridge Company, in conformity with this opinion.

The CHIEF JUSTICE, and Justices FIELD and GRIER dissented. The latter delivering an opinion, as follows:

I feel unable to concur in the opinion of the majority of my brethren, which has just been read. The general principles of law, as connected with the question involved in the case, are, no doubt, correctly stated, as to the strict construction of statutes as against corporations claiming rights so injurious to the public. My objection is, that they have not been properly applied to the case before us.

The power of one legislature to bind themselves and their posterity, and all future legislatures, from authorizing a bridge absolutely required for public use, might well be denied by the courts of New York; and as a construction of their own constitution, we would have no right to sit in error upon their judgment. But assuming a power for one legislature to restrain the power of future legislatures, those who assert that it has been exercised should prove their assertion beyond a doubt. Such intention must be clearly expressed in the letter of the statute, and not left to be discovered by astute construction and inferences. Although an act of incorporation may be called a contract, the rules of construction applied to it are admitted to be the reverse of these applied to other contracts. Yet the opinion of the

court, while admitting the rule of construction, proceeds on a contrary hypothesis, and with great ingenuity, and astute reasoning, has given a construction most favorable to the monopolist, and injurious to the people.

The judgment given by the majority of my brethren regards the general language of the act of incorporation as first bringing to the *Susquehanna* company a provision that "it shall not be lawful for any person or persons to erect any bridge," &c., across the *east and west* branches of the *Delaware:* as then bringing this specific clause into the charter of the Chenango company, and applying it to the *Chenango* River (a river with but a *single* stream); making it, moreover, apply to that stream for two miles, indeed, above the bridge, but for three-quarters of a mile only below it, the river's entire extent in that direction, and finding the complement of the "two miles," in a mile and a quarter of the river Susquehanna, into which the Chenango falls and is lost. While withal, by like construction only, the original limitation of thirty years disappears, and the charter becomes perpetual.

This mode of interpreting a legislative grant appears to me irrational, and beyond the most liberal construction that has been given to that class of enactments. Indeed, the fact that it required so ingenious and labored an argument by my learned brother to vindicate such a construction of the act seems to me, of itself, conclusive evidence that the construction should not be given to it.

[See *infra*, p. 210, *Turnpike Co.* v. *The State.*—REP.]

THE JOSEPHINE.

1. The case of the *Saigorry* (2 Wallace, 474), deciding that the blockade of the *coast* of Louisiana, having no direct communication with the port of New Orleans by navigation, was not terminated by the proclamation of May 12, 1862, discontinuing the blockade of that port—affirmed.
2. If a vessel is found without a proper license near a blockading squadron,

Statement of the case.

under circumstances indicating intent to run the blockade, and in such a position as that if not prevented she might pass the blockading force, she cannot thus, *flagrante facto*, set up as an excuse that she was seeking the squadron with a view of getting an authority to go on her desired voyage.

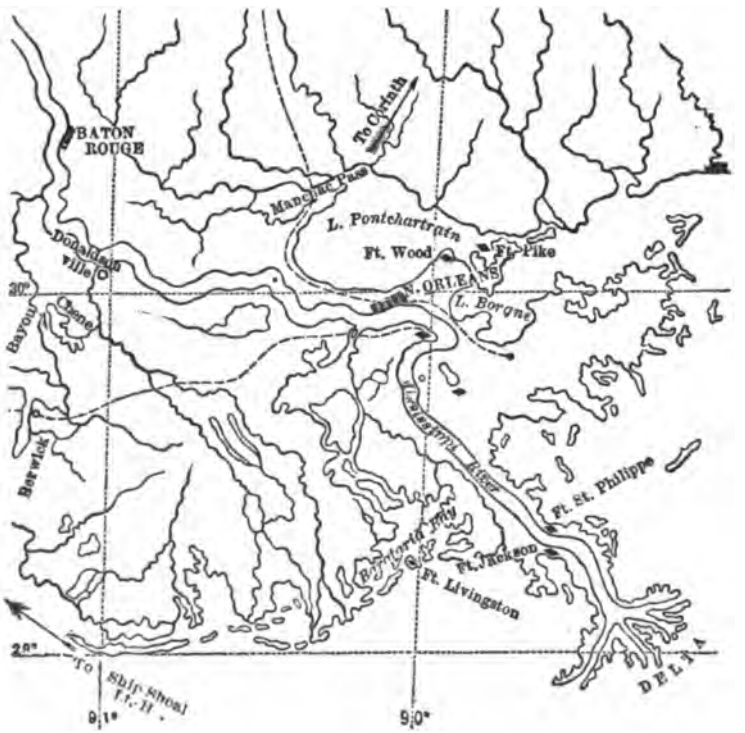
BY proclamation of President Lincoln, in April, 1861, a blockade was established along our whole Southern coast, then in possession of rebels against the authority of the Government. In the beginning of May, 1862, New Orleans and certain forts, Fort Jackson, Fort St. Philip, Fort Wood, Fort Pike, Fort Livingston, &c., passed, in consequence of the successes of Flag-Officer Farragut, into the possession of the Government, and from the 6th of May at latest, the possession of New Orleans became complete. On the 12th of May, 1862, the President issued his proclamation declaring that the blockade of the *port of New Orleans* should so far cease after the 1st of June, 1862, as that commercial intercourse with it might be carried on.

On the 28th July, 1862, nearly two months after the date last named, the Josephine was captured by the United States steamer Hatteras, on the high seas, and brought into Philadelphia, where she was libelled as prize. A certain Queyrouze intervened, claiming the cargo as the property of a French neutral, one Laplante, resident in France. He gave this history of the vessel: That she was loaded in New Orleans in February, 1862, with intention to proceed to Havana "as soon as the port of New Orleans should be captured and opened by the forces of the United States;" that Laplante intended to ship the cargo at Havana in another vessel for Bordeaux; that he had written from Bordeaux to Queyrouze, at New Orleans, instructing him to load a vessel and keep vessel and cargo there until the port was opened by the United States authorities; that it had been expected that an attack would be made on the city by the Government forces, and, anticipating its capture, Laplante had deemed it expedient to have a vessel loaded ready to leave immediately upon the opening of the port; that Queyrouze obeyed the instruction, and the vessel, having been loaded,

remained at the wharf of New Orleans until the investment of the forts below the city, in April, 1862; that it then becoming evident the Federal forces would capture the city, the rebel commander issued a proclamation commanding the destruction of all vessels lying at New Orleans, with the cotton, &c., on board, or in store for shipment; to avoid which destruction the master of the Josephine caused her to be towed into Bayou Chené, to a point in the interior, and distant from New Orleans, where she lay concealed for a long time; that the master meantime endeavored to communicate the true character of vessel and cargo and destined voyage to the Federal authorities, that he might be brought within their protection and licensed to proceed to Havana, but was unable to do so because the rebel governor had prohibited it by his proclamation; that about the 25th July, 1862, it having been reported that the rebel commander of the district where she lay concealed designed to destroy the vessel, the master managed to escape with his vessel and cargo to the Gulf by some of the secret passages from the body of the country to the Gulf with which that region abounds; that he then sailed towards the mouth of the Mississippi, expecting to fall in with some of the United States blockading squadron and obtain the license to proceed on the intended voyage, but that on the 28th of July, 1862, while hauling round Ship Shoal, in full view of the lighthouse, she was captured.

The master of the vessel, a resident of New Orleans, gave a different account; and swore in effect that the cargo belonged to other persons than Laplante, to wit: to certain Frenchmen, including one Sixé, resident and doing business in New Orleans; that he signed three bills of lading; that the cargo was deliverable to one Cabuzac, of Havana, to whom he was to go for orders, if he arrived there; that there were no papers of the kind inquired of on board; that is, no contract, agreement, license, protection, passport, or sea-brief from any government or officer thereof, but that he had a mail, containing letters, on board at the time of sailing, which he was instructed by Mr. Sixé to destroy in case

of capture, and which he threw overboard in pursuance of his instructions, and that he gave up no papers to the captors, having none; that he sailed from New Orleans four days before the capture of that city by the United States forces, and took his vessel to Bayou Chené; that he got to sea on the 27th of July, 1862, *and was bound to some port in Cuba or wherever he could get his vessel;* and that he was captured on the 28th of July, 1862, off Ship Shoal light-house, bearing east-northeast, *about ten miles* from the light-house, sailing under the English flag, without having cleared at any custom-house.



The mate, also a resident of Louisiana, corroborated the master, so far as his knowledge extended; stating that they sailed from Bayou Botey, Louisiana, and *were bound for Havana;* that they sailed under the English flag, and that a

little before the capture the captain threw overboard a bundle of papers. He presumed that the cause of the capture was the supposition that they had run the blockade.

Seacolor, a hand on board, said that the capture must have been because they had run the blockade.

The ship's papers found on board consisted only of some receipts for cotton, dated on the brig Josephine, from the 15th to the 19th of February, but without signature.

The map will show the peculiar character of the region in which the vessel was; a region which presents a reticulation of *bayous* interlacing with each other, in and through which it is possible to run from one portion of the country to another, in a manner rendering it almost impossible to follow a course, which may be made devious to almost any extent.

Cargo and vessel were both condemned (no claimant appearing for the latter); and the case was now here for review; the main question considered by the court being whether the vessel had violated the blockade; though the condemnation was justified, also, on the ground of enemy's property. A motion had been allowed, also, in this court, owing to certain special facts, to allow some further proofs.

Mr. Assistant Attorney-General Ashton, and Mr. Coffey, special counsel for the captors.

1. However owned, the ship was clearly captured whilst violating the blockade of the Louisiana coast, and was, with her cargo, liable to condemnation on that ground.

She left New Orleans, according to the master, four days before its capture by the United States forces, and when she was captured she was proceeding on the voyage then commenced. The blockade of that port was not then raised or relaxed, and there can be no question that, when captured, she was *in delicto* for that offence.

But, after she left New Orleans, the vessel lay for some months in one of the bayous, which form the secure retreats of rebel blockade-runners in Southern Louisiana, where, by the admission of Queyrouze, *she was within the rebel lines and*

control. She sailed out from those lines on the 27th of July, and was captured on the 28th, off the coast, under a false flag, *on her way to Cuba.* The master says, bound to some port in Cuba; and the mate says, "bound to Havana."

At that time, the coast of Louisiana and its ports were blockaded, all being in rebel possession and control, except the port of New Orleans. The limited and conditional cessation of the blockade of New Orleans, allowed by the President's proclamation of 12th May, 1862, did not and could not apply to any other port of Louisiana, or to any portion of the coast in rebel possession and control. This was decided in *The Baigorry*,* a year only ago. That *coast* was, at the date of capture, in a state of actual and lawful blockade, and the Josephine was taken in the act of breaking that blockade.

No evidence is necessary to fasten on the Josephine knowledge of the blockade, since she was sailing from a blockaded port. In the "*Prize Cases*,"† Mr. Justice Grier observed, that it is a settled rule in the law of nations, that a vessel in a blockaded port is presumed to have notice of the blockade as soon as it commences. But the claimant of this cargo must be charged with an actual knowledge, for he asserts, that at the time of capture the master of the Josephine was shaping his course for the blockading squadron. The offence was, therefore, complete.

In addition to its proved falsehood, the story of Queyrouze, that, at the time of the capture, the Josephine was seeking the blockading squadron to get a license or permission to proceed on her intended voyage, is subject to the further infirmity, that, if it were true, it would not relieve her from the penalty of blockade-running. No officer of the blockading squadron had any power to give such license or permission, and the law never accepts such an excuse from a vessel caught *in flagrante delicto.* It is of the class of excuses animadverted on by Sir William Scott, in *The Spes* and *The Irene*,‡ where vessels approached the mouth of a blockaded

* 2 Wallace, 474. † 2 Black, 677. ‡ 5 Robinson, 77.

river, with pretence of making inquiry as to the blockade, if they fall in with blockading vessels, but with intent to slip into port if they escape such vessels.

But the absurdity of the pretence set up by the claimant, of seeking the blockading squadron for a license, is proved not only by the master's contradiction of it in the statement that he was bound to Cuba, but by the facts that he was sailing under a false flag, and just before capture destroyed his papers. These acts, by the well-settled rules of law, stamp the voyage as fraudulent, and sustain the allegation of the libel.

2. The evidence proves that the cargo was owned by residents of New Orleans doing business there, and enemies of the United States. Sixé was one owner, and it having been by his instructions that the papers were destroyed, every presumption will be raised against him.

On both grounds, therefore, the decree condemning the cargo should be affirmed.

Mr. F. C. Brewster, of Philadelphia, contra, for the claimants of the cargo.

1. *Was the cargo liable for attempted breach of the blockade?* It is a self-evident proposition that, in order to justify a seizure and condemnation of property as prize of war for breach of a blockade, the blockade must in point of fact be existing at the time of the seizure. And where the blockade has ceased before the capture is made, the penalty for a breach of blockade is held to be remitted. Now, the proclamation of May 12 was a revocation of the notification of blockade of the port of New Orleans; and on the first day of June, 1862, the blockade of that port ceased. The Josephine was captured *nearly two months afterwards.* Inasmuch as the *delictum* is done away when the blockade ceases,* and as this is the rule even where the blockade existed at the time the vessel sailed from the port, but ceased or was raised before the capture was made, how can the vessel and

* The Lisette, 6 Robinson, 387.

cargo in question be held liable to the penalty for breach of blockade?

But if there was a breach of blockade, was it an intentional breach on the part of the owner of the cargo? The neutral must be chargeable with knowledge, either actual or constructive, of the existence of the blockade, and with an intent, and with some attempt to break it before he is to suffer the penalty of a violation of it.*

Though the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship, its owner will, nevertheless, be permitted to give proof of the innocence of his intention. And, if this proof be satisfactory, the cargo will be adjudged to be free from the guilt in which the ship is involved, and be restored to its owner. In *United States* v. *Guillem*,† Taney, C. J., says: "Even in the case of a cargo shipped as a mercantile adventure, and found on board of a vessel liable to condemnation for a breach of blockade, although it is *primâ facie* involved in the offence of the vessel, yet, if the owner can show that he did not participate in the offence, his property is not liable to forfeiture." And the late Chief Justice of this court did here but declare what had been previously said, in the case of *The Exchange*,‡ by Sir William Scott: "Where orders had been given for goods," said the great English judge, "prior to the existence of a blockade, and it appeared that there was not time for countermanding the shipment afterwards, the court has held the owner of the cargo not responsible for the act of the enemy's shipper, who might have an interest in sending off the goods in direct opposition to the interest of his principal. And the same indulgence has been exercised where there was no knowledge of the blockade till after the ship had sailed, and the master, after receiving the information, obstinately persisted in going on to the port of his original destination."

In the present case, the owner of the cargo has established

* Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185.

† 11 Howard, 62.

‡ 1 Edwards, 89.

the innocence of his intention. The instructions given to Queyrouze by Laplante show that Laplante never designed any attempt to break the blockade. On the contrary, he directed Queyrouze to keep the vessel and cargo at New Orleans until the opening of that port by the United States. Queyrouze followed these instructions, and detained the vessel after she had received her cargo, in port, until the act of the enemy deprived him of further control over her. The affidavit of Queyrouze is explicit upon these points.

With the guilt of the vessel (if there be such guilt) we have nothing to do in this case. We ask the court to discriminate between the vessel and her cargo.

To hold the owner of the cargo responsible in the way in which the captors wish, would be to put him completely in the power of the master; and, no matter how pure he may be, to make him bear the burden and suffer the penal consequences of a violation of the law which it was not in his power to prevent, and of which he never suspected the master would be guilty.

As to the master's destruction of the mail containing letters. The act of the master, in this respect, cannot operate to the injury of the owner of the cargo. For, 1st, the carrying of a mere private mail—that is, one which does not contain *despatches* of the enemy—will not subject either the vessel or her cargo to seizure and confiscation. And, 2d, even where the vessel carries despatches, and is seized in consequence thereof, the cargo will not share her fate where its owner or owners have not participated in the offence. It cannot be pretended, in the present case, that either Laplante or Queyrouze was guilty of any such offence. These letters were the only papers which the master destroyed. He destroyed no papers concerning the ownership of the cargo, for he had none such with him.

2. *Was the cargo enemy's property?*

It was the property of Laplante, a French subject, who resided in his native country, and never had even a temporary residence in the South. The affidavit of Queyrouze establishes this fact. The presumptions of the master of the

captured vessel upon this point, cannot stand against the positive testimony of Queyrouze.

Nor can a hostile character be fastened upon it on account of the residence of Mr. Queyrouze, Laplante's agent, in New Orleans, while that city was in the possession of the rebels. For the rule is, that a neutral merchant may trade, in the ordinary manner, to the country of a belligerent, by means of a stationed agent there, and yet not contract the character of a domiciled person.*

The CHIEF JUSTICE delivered the opinion of the court.

It was held at the last term, by this court, that the blockade of the coast of Louisiana, having no direct connection with New Orleans by navigation, was not terminated by the discontinuance of the blockade of that port. In the cause now before us it is not very clearly shown by the evidence from what part of the coast the Josephine was coming when she was captured by the blockading steamer; but she must have been coming from some point west of Ship Shoal light, which is laid down on the Coast Survey charts as more than a hundred miles west of the mouths of the Mississippi. In this part, it seems, the coast may be reached from New Orleans, in some seasons at least, through the creeks and bayous which form a sort of network of water communication in Lower Louisiana, and allow more or less egress and ingress by small craft, to and from the Gulf. There does not appear to be any regular or usual communication with New Orleans from the Gulf by these ways. The Josephine succeeded in getting through, but the whole country through which she passed, and the coast where she came out, was in possession of the enemy; and she was captured by a blockader soon after she entered the Gulf.

It is impossible, under these circumstances, to hold that the blockade of that part of the coast was discontinued. That it was not discontinued in fact, is clearly shown by the evidence; and there was nothing in the occupation of the city, or in the proclamation revoking the blockade of the port

* The Anna Catharina, 4 Robinson, 107; The Indiana, 2 Gallison, 268.

of New Orleans which could work the legal termination of blockade of the coast which remained under hostile control.

We think that the blockade was in full force, and that the Josephine and her cargo were properly captured for violation of it. The appellant has filed an affidavit that the master of the Josephine was seeking the blockading fleet with the purpose of procuring a license to proceed on his voyage; but the statement of the master not only does not support the affidavit, but goes far to discredit it. Nor, indeed, could the alleged intent, if proved, avail the appellant; for it would not excuse the violation of the blockade.

This view makes it unnecessary to consider the questions made in the cause, respecting the ownership of the vessel and cargo, or the motion for further proof.

The decree of the District Court must be AFFIRMED.

[See *infra*, p. 231, *The Cheshire*, 2.—REP.]

SHEBOYGAN CO. v. PARKER.

1. A county "officer" is one by whom the county performs its usual political functions or offices of government; who exercises continuously, and as a part of the regular and permanent administration of government, its public powers, trusts, or duties. A fixed number of persons, specially and by name appointed by the legislature to act as a board of commissioners, in a matter about which, though relating immediately to the county, county officers, in the exercise of their general powers as such, and without special authority from the legislature, have not authority to act, are not county "officers."

2. Hence, when special authority was given by the legislature to the people of a county, to say whether or not they would subscribe to a railroad and bind themselves to pay for it, that body, in giving the authority, may properly direct the mode in which such subscription shall be made and paid for;—may, *ex. gr.* appoint special persons to make the subscription, and to issue bonds in behalf of the county therefor—even though the constitution of the State in which the county is provides that "all *county officers* shall be elected by the electors of the county," and though there may be a regular board of county supervisors elected accordingly, then administering the ordinary county affairs. Bonds so executed and issued bind the county.

NOTE. In this case, the statute enacted that any bonds issued under its provisions should be "of full and complete evidence both in law and equity to establish the indebtedness of the county."

Statement of the case.

THE constitution of Wisconsin ordains that "all *county officers* shall be elected by the *electors of the respective counties.*" With this fundamental law in force, and with a county board of supervisors in existence, who, under the constitution and laws, were the ordinary administrators of its affairs, the legislature of the State, by "an act to authorize the County of Sheboygan to aid in the construction of a railroad," constituted Lewis Curtis, "Billy Williams," and three other persons less peculiarly entitled, a board of commissioners for aiding the project. The act directed a vote of the people of the county to be taken, as to whether or not they would have a subscription "in pursuance of the act," and then authorized *these* commissioners to borrow money on the credit of the county, and to issue its bonds therefor. The bonds were to be signed by the president and secretary of *this* board, and countersigned by the clerk of the regular county board of supervisors, or by the county treasurer; and it was declared that, when thus prepared and issued, they should, "in the hands of any *bonâ fide* holders, be of *full and complete evidence to establish the indebtedness of the county according to their tenor and effect.*"

A vote of the people having decided in favor of the railroad, the bonds were issued with interest warrants or coupons annexed. These were not in the exactly usual form of *promises* to pay, or of declarations that so much money was due the bearer, at the semi-annual dates; but were *drafts* by "Lewis Curtis, President of the Board of the Sheboygan County Railroad Commissioners," on "the Treasurer of the County of Sheboygan," in favor of the bearer for so much, and was signed by Williams as "secretary."

A number of the warrants being due and unpaid, in the possession of one Parker, a *bonâ fide* holder, he sued the county, under its legal and corporate name of "The County Board of Supervisors of Sheboygan County," in the Circuit Court of Wisconsin, to enforce a payment of them.

On error from that court, where judgment was given against the county, the question was, whether the act constituting the new board was constitutional, and the county bound?

Argument for the county.

Messrs. J. S. Brown, Buttrick, and Hill, for the County, plaintiff in error. No persons but *county officers* can govern the county and regulate its affairs. True in all cases, this is certainly not least true in so important a matter as borrowing money, and binding the county by bonds to pay it back. These five persons were not "elected by the electors of the county," as the constitution requires county officers to be.

What are they? They are a corporation created for the purpose of aiding in the construction of a railroad. But by the principles of every free government, and of the constitution of Wisconsin, it is not in the power of the legislature to authorize one corporation to create a debt for another without the consent, express or implied, of the party to be charged. The bonds were issued by the new, excrescent, or "outside" board, on their own motion, and without the consent of the constituted authorities of the county. But a county cannot exercise its corporate powers in any other way than through its constitutional channels. If the legislature can confer such power as has been attempted to be exercised upon five men, they can confer it upon one, or upon the whole people. Reduced to its elements, the act in question authorizes A. to issue the bonds of B. to C. without B.'s consent.

Indeed, it is plain that this board has felt the truth of all this. Their interest warrants are in a peculiar form. They are not promises of any kind or to anybody; but are mere requests, unaccepted drafts from the board to the county treasurer to pay the bearer the amounts named in them. Now, the county treasurer has no power to pay money out on the order of any other person, corporation, or board, than the board of supervisors of the county. The coupons in this case are not such orders; they are not *assumpsits* of the county, and are incompetent, immaterial, and irrelevant to establish any demand against the county at all.

After argument by *Mr. M. H. Carpenter, contra, for the bondholder,*

Mr. Justice GRIER delivered the opinion of the court.

It is admitted that the bonds in question were issued in conformity with the statute of the Wisconsin legislature. By this statute, the bonds issued in pursuance of it are made "full and complete evidence, both in law and equity, to establish the indebtedness of the county according to their tenor and effect."

The objection is, that the act is unconstitutional and void. Is the objection well founded?

The commissioners or board of supervisors of a county, in the exercise of their general powers as such, have no authority to subscribe stock to railroads, and bind the people of the county to pay bonds issued for that purpose without special authority conferred upon them by the legislature. But when special authority is given to the people of a county to do these acts, and bind themselves by the issue of such bonds, the legislature may properly direct the mode in which it shall be effected. The persons specially appointed to act as agents for the people have a ministerial duty to perform in issuing the bonds, after the people, at an election held for the purpose, have assented that they shall be bound.

Such persons, in performance of their special duty, are in no proper sense, "county officers." They do not exercise any of the political functions of county officers, such as levying taxes, &c. They do not exercise "continuously, and as a part of the regular and permanent administration of the government, any important public powers, trusts, or duties."*

An officer of the county is one by whom the county performs its usual political functions; its functions of government. Any other persons appointed by the legislature and the people of the county, would be as competent to execute the bonds of the corporation as the supervisors. They are the lawful agents of the people for this special purpose, and though nominated by the legislature, they cannot act without the assent of the citizens of the county, ascertained in the manner directed by law; and, having so acted, the county cannot now repudiate their acts.

JUDGMENT AFFIRMED, WITH COSTS.

* State v. Kennon, 7 Ohio, 562.

SPARROW v. STRONG.

1. Under the ninth rule of this court, a writ of error or appeal from any judgment or decree rendered thirty days before the commencement of the term may be docketed and dismissed on motion of the defendant in error or appellee, unless the other side dockets the cause and files the record with the clerk of the court within the first six days of the term. But if no motion to dismiss be previously made, the record may be filed and the cause docketed at any time within the term.
2. The value of a "Mining Claim" in Nevada may be the subject of estimate in money; and this court will take jurisdiction of a suit concerning such a claim, if of the requisite value, though the land where the claim exists has never been surveyed and brought into market. [The claim may perhaps exist under the old governments of Spain or Mexico. Moreover, mining interests, apart from fee simple rights in the soil by patent, existed before the act of Congress of February 27, 1865, under the implied sanction of the Federal Government.]
3. When the judgment brought before this court by writ of error purports to affirm generally the judgment of a court inferior to the affirming court; and the only judgment in the record of such inferior court is a general judgment; this court will take jurisdiction, though an appeal has also been taken in the inferior court, under State laws, upon a motion refusing a new trial, and there are some indications in the record that this affirmance was intended to be of that refusal.

SPARROW brought an action in the nature of an ejectment in the District Court for the first judicial district of Story County, *Nevada Territory*, to recover an interest in a *Mining Claim*, a sort of interest very common in the argentiferous Territory just named.

The case was tried before a jury upon a considerable body of evidence, and a verdict having been given for the defendant, a judgment in the nature of a judgment in ejectment was regularly rendered by the court upon it.

Subsequently, a *motion for new trial* was made. A statement embodying all the evidence was drawn up and agreed to by counsel, and upon this statement and some affidavits tending to show surprise on the trial, and new evidence discovered after trial, the motion was argued before the District Court. It was overruled, and from the *overruling order* an appeal was taken, on the 15th November, 1862, to the *Su-*

preme Court of the Territory, under an act of the Territorial legislature authorizing *such* appeals.

On the 16th of March, 1863, the Supreme Court gave judgment in the cause as follows:

"On appeal from the District Court of the first judicial district in and for Story County.

"Now, on this day, this cause being called, and having been argued and submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here *seen* and *fully considered*, the opinion of the court herein is delivered by Turner, C. J. (Mott, J., concurring), to the effect that the *judgment* below be affirmed.

"Wherefore it is now *ordered*, *considered*, and *adjudged* by the court here, that the *judgment* and *decree* of the District Court of the first judicial district in and for Story County, *be and the same is affirmed* with costs."

From this judgment of the Supreme Court of Nevada a writ of error was taken here; the affidavit filed being the ordinary one, that "the value *of the property in dispute*" exceeded $2000. The record did not show any bill of exceptions.

A rule of this court (the ninth), requires that when a writ of error shall be brought to it from any judgment or decree rendered thirty days before the commencement of the term—which this writ was—it shall be the duty of the plaintiff "to docket the cause and file the record thereof with the clerk of this court, within the first *six* days of the term." In the present case the writ of error was properly sued out, August 14, 1863, returnable to the next term of the court; and was regularly served. A citation was also served returnable to the same term. *After* the writ, citation, and record were filed and the cause docketed, a motion to dismiss the case was made and argued at the last term:

1. Because the record was not filed in time by the plaintiff in error.

2. Because the interest in controversy was not capable of a money valuation; and, therefore, not of the value, within

the meaning of the statute, of one thousand dollars, the amount necessary to give jurisdiction to this court.(a)

To understand the force or want of force of this second objection it is necessary to state, on the one hand, that the Territory of Nevada from which the case came, was formerly part of the province of Upper California, and belonged first to old Spain, afterwards to Mexico, and was acquired by the United States only in 1848, by treaty;* and that our government, as yet, had made no grants of its public lands there or of any rights in them. Of course no one could hold anything by patent or other formal grant from this government, in which, subject to prior private rights, everything still remained vested. On the other hand, it is to be stated that in the treaty referred to† it is admitted that previously to our acquisition of it, the ceded territory had been settled to some extent by the authority of pre-existing governments, and that all rights thus existing are made inviolable. In fact, immense estates in California—a part of the acquired territory—rest on the titles derived from the "former governments."‡

Congress had also established, in March, 1861, when Nevada, previously a part of Utah, was made a Territory by itself, a government for that Territory; having a legislature with the usual powers of these bodies in the Territories; and this legislature had acted on the development of the mines as a subject more or less within its competence.

(a) A third ground was made at the last term for dismissing the case, to wit: That the jurisdiction of this court, if it ever had any, was taken away by an act of Congress (passed between the time of granting the writ of error and the date of the motion to dismiss), admitting the State of Nevada into the Union, without any provision which should save the jurisdiction vested in this court by the act organizing the Territory. This omission was, however, supplied by an act of Congress of February 27, 1865, which was held valid and effectual by this court in Freeborn v. Smith (2 Wallace, 160), at the last term. This third ground relied on for dismissal was, therefore, as the Chief Justice observed, now necessarily to be regarded as untenable.

* Treaty of Guadalupe Hidalgo, made after the war of 1847, between Mexico and the United States, 9 Stat. at Large, Treaties, p. 922.

† Articles 8th and 9th.

‡ See the Sutter Case and the Fossatt Case, 2 Wallace, 564, 649.

Independently of this, however, a special kind of law—a sort of Common Law of the miners—the offspring of a nation's irrepressible march—lawless in some senses, yet clothed with dignity by a conception of the immense social results mingled with the fortunes of these bold investigators—had sprung up on our Pacific coast; and presented, in the value of a "Mining Right," a novel and peculiar question of jurisdiction for this court.*

The case, however, was not disposed of at the last term, nor either of the two points already mentioned passed on. It was ordered to stand over for argument on another point, the point, to wit, whether the judgment of the Supreme Court of Nevada, above referred to, was a final *judgment or decision* reviewable here within the meaning of the act of Congress organizing the Territory; an act which gives this court jurisdiction to review "*the final decisions*" of the Supreme Court of the Territory.

Messrs. Browning and Cope, for the motion to dismiss, argued

* This Common Law of the miners was described, soon after the decision here reported was made, by a Senator of the United States, from the Pacific coast, in a manner so full and interesting as to have attracted general notice. I refer to the remarks made by Mr. Senator Stewart of Nevada, in the Senate of the United States, in June, 1865, and in which the justice and wise policy of the decision above given was shown and enforced.

The reader will not feel, I hope, that I incumber the report with matter wholly irrelative by the extract which I give in an Appendix, No. 1.

Mr. Stewart remarks that the Common Law of the miners has to some extent had the sanction of Congress; though, with "one single exception," no *statute* had been enacted to give it force.

This exception was exhibited at the Congressional session of 1865-6, when the following law (*Act of Feb.* 27, 1865, 13 *Stat. at Large*, 441) was passed:

"No possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to such title, shall be affected by the fact that the paramount title to the land on which said mines are, is in the United States; but each case shall be adjudged by the law of possession."

This statute of Feb. 27, 1865, to which Mr Senator Stewart refers, as the "one single exception," the reporter supposes, would have rendered the last question in the present case free from difficulty had the law existed when the case first arose, but it did not.

at the last term and at this on the *three* several points as follows:

I. *As to the time at which the record was filed and the cause docketed.* The language of the ninth rule is imperative. It is a general rule and as obligatory while in force as a statute. The record, confessedly, was not filed within the first six days of December Term, 1863. It was therefore not filed as the rule exacts, and the writ should be dismissed on this ground.

II. *As to the value of the subject in controversy.* The affidavit, which is filed in the case, declares indeed that "the property in dispute" is of the value of two thousand dollars; a sum sufficient, we admit, to give the jurisdiction. But the matter in dispute is a "Mining Claim." The land in which the mine exists belongs still to the General Government. It has never been surveyed nor brought into market. No pecuniary value can be attached to the possession by a claimant of anything of which the ownership is in another person. In this case the possession is one amounting in strict law to a trespass; at best, to a tenancy at will of the government. It may be terminated at any moment. Its value depends upon the course which the government may pursue in asserting or omitting to assert its right of ownership. Whatever the occupant may hope for or even expect; whatever the government may in the benignant course of its dealings see fit hereafter to do by such a person, it is plain that he has neither right, title, interest, claim, nor demand in or to the property in suit. Such an estate, or no-estate as it more truly is, cannot be estimated in the sense which the law requires to give jurisdiction. Is not *Lownsdale* v. *Parish*,* in this court much in point? There the matter in dispute was a piece of real estate in Oregon Territory, which Territory then happened to be claimed by the United States and by Great Britain, at once; the subjects of the two governments, occupying the region only by virtue of a treaty between the two nations. How the title might ultimately be settled and

* 21 Howard. 290.

to which government the land might finally pass, was, of course, a matter resting in speculation; dependent upon what the two governments might or might not do; just as here what the one government may or may not do. This court there held that the title to the subject of controversy was not capable of estimate in the sense required by law to give jurisdiction to this court.

III. *On the last point—the point on which the case stands over—"Is the judgment a final one?"* However the matter may be disguised, or the mind misled by the technical words, "judgment," "decree," &c., and the old-fashioned formula of "seen," "fully considered," &c., used in the record, it is obvious that the judgment, or decree which has been affirmed, is but the judgment and decree ordering a *new trial;* nothing else. In other words, that the terms "judgment," and "decree," are, in Nevada Territory, and under its peculiar system of law—which makes the granting or refusal of a new trial the subject of review in an appellate court—applied to the *affirmance of the order of the District Court overruling the motion for a new trial.* It is not worth while to be so lost in the *technique* of the law—in the verbality of clerical "entries"—as to forget "that *words* are the daughters of earth and *things* the sons of heaven."

It seems that there was no "assignment of errors." The judgment was probably affirmed for want of one. But as the record stands, this court rests in ignorance of the ground on which the judgment proceeded; and the case stands here simply as a writ of error to bring before this court for revision the decision of the Supreme Court of Nevada, upon a motion for a new trial. Need we say that this tribunal will not review decisions on points resting purely in the discretion of the court below? It was but at the last term* that this court declared, with what seemed to be a special emphasis, and a warning not to bring such cases here, that "its decision has *always* been that the granting or refusal of a new trial is a matter it *cannot* review."

* Freeborn v. Smith, 2 Wallace, 176.

Messrs. O'Connor and Billings, contra.

The CHIEF JUSTICE now delivered the opinion of the court, on all three of the points.

The first ground taken in favor of dismissing the writ of error, to wit, that the record was not filed in time by the plaintiff in error, is untenable. The writ was regularly sued out on the 14th of August, 1863, returnable at the next term of the court thereafter, and was duly served; a citation was also issued and served, returnable at the same term; and the writ and citation, with the record, were returned here and filed, and the cause docketed before the motion to dismiss. It has been repeatedly held that, in such a case, no motion to dismiss, under the ninth rule, can be entertained.*

Nor do we think that the appeal should be dismissed for the second reason assigned by the defendant in error, namely, that the subject of controversy is not of the jurisdictional value. It is insisted that the matter in dispute is a mining claim; that the land where the mine exists has never been surveyed and brought into market; and that, consequently, there can be no mining right to such land in any person, capable of being estimated in money.

It is true, that in the case of *Lownsdale* v. *Parrish*,† this court held, that an obstruction to the enjoyment of land claimed under a law or regulation of a convention in Oregon, held without the sanction of the United States, and during the joint occupation of that country by Great Britain and the United States, was not an injury capable of being so valued as to give jurisdiction to this court; nor, indeed, an injury of which the courts of the United States could take cognizance at all. But that decision was put distinctly on the ground that Congress, when it came to act on the organization of Oregon, expressly declared that all laws theretofore passed in that Territory, making grants of lands or

* Bingham v. Morris, 7 Cranch, 99; Wood v. Lide, 4 Id. 180; Picketts' Heirs v. Legerwood, 7 Peters. 146; Owings v. Tierman, 10 Id. 24; Given v. Breedlove, 15 Id. 284.

† 21 Howard, 290.

otherwise affecting or encumbering the titles to lands, should be and were thereby declared "null and void."

The claim, which the court was asked to protect, was asserted under a law thus declared null and void by the highest legislative authority. It was for this reason that the court refused to take jurisdiction in *Lownsdale* v. *Parrish* and dismissed the appeal.

The writ of error now before us relates to a very different subject of controversy. The Territory, of which Nevada is part, was acquired by treaty. Rights and titles, acquired under ceding governments, remain unimpaired under our government. We cannot know judicially, therefore, that the right and title in controversy was not so acquired. If it was, it certainly may be capable of being valued in money.

But if this were otherwise, we do know that in the act organizing the Territory of Nevada there is no clause annulling grants or claims to land, while large legislative powers are conferred by the Territorial legislature, limited only, as to lands, by the prohibition of interference with the primary disposal of the soil by the United States, and of unequal taxation in certain cases. We know, also, that the Territorial legislature has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts.* And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country.

We cannot dismiss this writ of error, therefore, on the ground that a controversy concerning the possessory right to a mining claim, existing under the express sanction of the Territorial legislature and the implied sanction of the national government, does not relate to a subject-matter capable of being valued in money.

* Laws of Nevada Territory, p. 16, § 40, and p. 21, §§ 74, 77.

As the questions, thus far considered, were argued at the last term, the motion would have been then disposed of had not doubts been excited by an inspection of the record, upon the point for the argument of which the motion was ordered to stand over.

It is insisted, on this point, that the judgment is merely an affirmance of the order of the District Court overruling the motion for new trial. If this be so, the judgment itself is, in substance and effect, nothing more; and it is settled* that this court will not review such an order. The granting or refusing of new trials is a matter of discretion, with the exercise of which, by the court below, this court will not interfere. The circumstance that the discretion was exercised under a peculiar statute by an appellate court, and on appeal, cannot withdraw the case from the operation of the principles which control this court.

But the majority of the court does not feel at liberty to disregard the plain import of the terms of the judgment rendered by the Supreme Court of the Territory. It does not purport to be an order or judgment affirming an order overruling a motion for new trial, but a judgment affirming the judgment or decree of the District Court, and the only judgment or decree, which we find in the record, is the judgment for the defendants in the action of ejectment.

If this view be correct, the judgment of the Supreme Court is one to review which a writ of error may be prosecuted. And the record shows that the writ has been regularly sued out and returned. This court therefore has jurisdiction, and it has been repeatedly held in similar cases,† that on a motion to dismiss, the court will look to the regularity of the writ and the fact of jurisdiction. Other questions must, in general, await final hearing.

MOTION TO DISMISS OVERRULED.

* Doswell v. De la Lanza, 20 Howard, 29; Henderson v. Moore, 5 Cranch, 12; Marine Ins. Co. v. Hodgson, 6 Id. 206; Barr v. Gratz, 4 Wheaton, 220.

† Minor v. Tillotson, 1 Howard, 288; Hecker v. Fowler, 1 Black, 95.

LEWIS v. CAMPAU.

A final judgment or decree by the highest court of law or equity of a State that revenue stamps attached to a deed offered in evidence and objected to as not having stamps proportioned to the value of the land conveyed are sufficient—is not a subject for review by this court under the 25th section of the Judiciary Act of 1789.

CAMPAU sued Lewis in the Supreme Court of Michigan, "the highest court of law and equity" in that State; and on the hearing there, objection was made to the admissibility of a deed which was offered in evidence, on the ground that the United States revenue stamps attached to it were not sufficient in amount; that is to say, were not proportioned in amount to the value of the land conveyed; as the act of Congress relating to our internal revenue requires that they should be; and that the deed was therefore void. The court being satisfied that the value of the land was not sufficient to require stamps of greater amount than were actually attached admitted the deed; and final judgment having gone in favor of Lewis, the other party, Campau, brought the case here on error as being within the 25th section of the Judiciary Act of 1789; a section which enacts that a final judgment or decree in any suit in the highest court of law or equity in a State wherein is drawn in question the *validity* of a statute of the United States and the decision is against its validity; or where is drawn in question the *construction* of any clause of a statute of the United States and the decision is against the title, right, or privilege specially set up or claimed by either party—may be re-examined here

Mr. Walker now moved to dismiss the cause, on the ground of want of jurisdiction, *Mr. Bishop opposing.*

The CHIEF JUSTICE: Neither the validity of the statute, nor its construction was in any way drawn in question. The only question the court had to pass upon, and this only

incidentally as affecting the admissibility of evidence, was the value of the land.

This is not a question which can be brought into this court under the 25th section of the Judiciary Act.

WRIT OF ERROR DISMISSED.

YORK COMPANY v. CENTRAL RAILROAD.

1. The common-law liability of a common carrier for the safe carriage of goods may be limited and qualified by special *contract* with the owner; provided such special contract do not attempt to cover losses by negligence or misconduct.

   Thus, where a contract for the transportation of *cotton* from Memphis to Boston was in the form of a bill of lading containing a clause exempting the carrier from liability for losses by *fire*, and the cotton was destroyed by fire, the exemption was held sufficient to protect the carrier, the fire not having been occasioned by any want of due care on his part.

2. Where a deposition is taken upon a commission, the general rule is that all objections to it of a formal character, and such as might have been obviated if urged on the examination of the witness, must be raised at such examination, or upon motion to suppress the deposition. It is too late to raise such objections for the first time at the trial.

   Thus, where a copy of a bill of lading was annexed to the answer of a witness examined on a commission, and no objection to the copy was taken at the examination or by motion to suppress afterwards, it was held that the objection that the original was not produced or its loss shown came too late at the trial.

TROUT & SON shipped at Memphis, on the Mississippi, a large quantity of cotton, on board a steamer belonging to the Illinois Central Railroad Company, common carriers; which by the terms of the bill of lading was to be delivered at Boston, Massachusetts, the consignees paying $4.75 per bale, "*fire* and the unavoidable dangers of the river *only excepted.*" The bill of lading which referred to the cotton as shipped by "*Trout & Son*" was signed in four; two copies being given to Trout & Son, of which they retained one, for-

warding the other to the York Company in New England, for whom the cotton was intended. In the course of the transit the cotton was destroyed by fire.

The company now sued the carriers in the Circuit Court of Illinois for damages. Trout was examined on *a commission*, and having stated that his firm were but agents of the York Company and that the shipment was made on *its* account as owner, proved the fact and contract of shipment (which last he stated was in the form of a bill of lading) and the value of the cotton. But he did not produce on his examination in chief any original or copy of the bill itself.

The carriers, who wished to rest their case on the fire clause in the bill, inquired of him on cross-interrogatories whether one or more of the bills had not been delivered to him, and directed him, if one had, to annex "the same or a certified and proved copy to his deposition, and to let the same be properly *identified by the commissioner in his return.*" The witness answering that one of the bills had been delivered to him annexed "a true copy of it from his books." The fire clause appeared in it; though the witness stated that the cotton was shipped on the steamer before the bills were signed; that he had not examined the bills; that "his attention was not called to the fire clause," and that his firm had no authority to ship for their principals with that exemption.

On the trial, the plaintiff *not having made objection during the execution of the commission nor by motion to suppress*, objected to the reading of the answers to the cross-interrogatories which showed a *copy* of the bill; the ground of the objection being that the contract was shown to be in writing, and that no foundation had been laid for secondary evidence either by notice to produce the original bill or by evidence of its loss. But the court overruled the objection.

The defendant had judgment. On error four objections were made to it here.

1. Because it was doubtful whether as common carriers the defendants could exempt themselves from risks by fire.

2. Because if they could, still that Trout & Son, who were really but agents of the York Company, could not give their assent to such exemption.

3. Because if they had given such assent no consideration had been paid by the company, in a reduced rate of fare or otherwise, for this restriction of the carrier's common-law obligation.

4. Because the *copy* of the bill of lading, in the absence of notice to produce the original or of proof of its loss, was improperly allowed to be read.

Mr. Hitchcock, for the owners of the cotton: The law imposes upon the carrier a definite and absolute duty, and he ought to be under an incapacity to contract in derogation of that duty. Such contracts are usually an empty form of words, imposed by a party who has no right to propose them, upon another who has no power to repel them, and who rarely, in any sense, assents to them.

The reasoning of Judge Cowen, in the New York cases of *Cole* v. *Goodwin** and *Gould* v. *Hill*,† and of Judge Nesbitt, in the Georgia case of *Fish* v. *Chapman*,‡ is more satisfactory upon principle and authority than that of later cases, establishing a somewhat different rule. The late Mr. H. B. Wallace, the American annotator of Smith's Leading Cases, in the last edition of that work published before his death, in 1852, regarded the question whether a carrier, when charged upon his common-law responsibility, could discharge himself from it by showing a special contract, assented to by the owner, as one then still open. Some decisions since then tend perhaps to a different view; though many of the best judges and text-writers regret their tendency, and hold them to strict limits.

1. It is certainly settled that any kind of *notice*, though brought home to the shipper, will not exonerate the carrier from the liabilities which the law annexes to his employment; though it may perhaps be too late to assert confi-

* 19 Wendell, 251. † 2 Hill, 623. ‡ 2 Kelly, 349.

dently that if the owner expressly assents to such notice and agrees to be bound by it, and there is sufficient consideration for it, it shall still be without effect.*

2. But it is shown that Trout & Son, though they had authority to ship, had no authority to agree to any restriction on the carriers' common liability. Their authority to forward was certainly, of itself, not an authority to make an unusual and special contract, restricting the liability in a most important feature. The contract, made without the assent of one party to it, differs in no respect, then, from a general notice brought home to the shipper, which, as we have said already, is universally held inefficacious.

3. Even, however, had Trout & Son been authorized thus to contract, the burden lies upon the carrier to prove a consideration for the special exemption from a common-law liability, and without such consideration the contract has no obligation. In all the cases in which effect has been given to these special contracts with carriers, by which their common-law liability was limited, this essential requisite of a contract has been found. Thus, in *The New Jersey Steam Navigation Co.* v. *Merchants' Bank*,† in this court, a full consideration is expressed in the instrument, which is, moreover, signed by the parties and under seal. So in *The Illinois Central Railroad Company* v. *Morrison*,‡ a full consideration in the reduction of the rate of freight was proven, and the contract was also signed and sealed. So in *Kimball* v. *The Rutland Railway*,§ a similar consideration was shown, and also the assent of the plaintiff in express terms.

4. The rule that notice to produce, or the loss of, the original, should be shown before parol evidence of the contents of a written instrument is admissible, will hardly, in its general force, be questioned. This case should present no exception. Will it be said that the copy was first objected to on the trial? This is true. But from the nature of the case, it could not have been properly objected to at any

* See 1 Smith's Leading Cases, 6th American edition, pp. 396–406; and at p. 887 an able opinion by Thompson, C. J., of Pennsylvania, to this effect.

† 6 Howard, 344. ‡ 19 Illinois, 136. § 26 Vermont, 252.

other time. The objection was a substantial and not a formal one; and such objections are always heard at the trial. There is no rule or practice of the court requiring any other than formal objections to be stated in writing before the cause is called for trial. If a motion to suppress had been urged before the trial, it would have been said, in reply, that the testimony might be made competent before it would be offered, by showing a notice to produce the original, or that it was unattainable, by destruction or otherwise. Could the court assume, for the purpose of suppressing a deposition, that the requisite proof would not be made to render it competent?

Mr. Tracy, contra.

Mr. Justice FIELD delivered the opinion of the court.

The right of a common carrier to limit his responsibility by special contract has long been the settled law in England. It was the subject of frequent adjudication in her courts, and had there ceased to be a controverted point before the passage of the Carrier's Act of 1830.

In this country, it was at one time a subject of much controversy whether any such limitation could be permitted. It was insisted that, exercising a public employment, the carrier owed duties at common law, from which public policy demanded that he should not be discharged even by express agreement with the owner of the goods delivered to him for transportation. This was the ground taken by Mr. Justice Cowen, of the Supreme Court of New York, in *Cole* v. *Goodwin*;* and, although what that learned judge said on this point was mere *obiter*, as the question presented was not upon the effect of a special agreement, but of a general notice, it appears to have been adopted by a majority of the court in the subsequent case of *Gould* v. *Hill*.† But from this doctrine that court has since receded; and, in a recent decision, the Court of Appeals of that State has affirmed

* 19 Wendell, 251.

† 2 Hill, 623.

the right of the carrier to stipulate for a limitation of his responsibility.* The same rule prevails in Pennsylvania; it has been asserted in Ohio and in Illinois, and, it is believed, in a majority of the other States; and in *The New Jersey Steam Navigation Co.* v. *The Merchants' Bank*, it received the sanction of this court.†

Nor do we perceive any good reason, on principle, why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only; it involves simply rights of property; and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire.

The law prescribes the duties and responsibilities of the common carrier. He exercises, in one sense, a public employment, and has duties to the public to perform. Though he may limit his services to the carriage of particular kinds of goods, and may prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons, or vary his charges from their condition or character. He is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal. He is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part; and he cannot, by any mere act of his own, avoid the respon-

* Parsons v. Monteath, 13 Barbour, 353; Moore v. Evans, 14 Id. 524; Dorr v. The New Jersey Steam Navigation Co., 11 New York, 486.

† 6 Howard, 382; Atwood v. Delaware Transportation Co., 9 Watts, 89; Camden & Amboy Railroad Co. v. Baldauf, 16 Pennsylvania State, 67; Verner v. Sweitzer, 32 Id. 208; Kitzmiller v. Van Rensselaer, 10 Ohio, 64; Illinois Central R. R. Co. v. Morrison, 19 Illinois, 136; The Western Transportation Co. v. Newhall, 29 Id. 466.

sibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused.

The owner of the goods may rely upon this responsibility imposed by the common law, which can only be restricted and qualified when he expressly stipulates for the restriction and qualification. But when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement.

We do not understand that the counsel of the plaintiff in error questions that the law is as we have stated it to be. His positions are that the agents of the plaintiff at Memphis, who made the contract with the Illinois Central Railroad Company, were not authorized to stipulate for any limitation of responsibility on the part of that company; and that no consideration was given for the stipulation made.

The first of these positions is answered by the fact that it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton. So far as the defendant could see, they were themselves the owners.

The second position is answered by the fact, that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made.

The objection urged to the introduction of the copy of the bill of lading annexed to the deposition of the witness Trout, was properly overruled. The deposition was taken upon a commission, and in such cases the general rule is, that all objections of a formal character, and such as might have been obviated if urged on the examination of the witness, must be raised at such examination, or upon motion

to suppress the deposition. The rule may be different in some State courts; but this rule is more likely than any other to prevent surprise and secure the ends of justice. There may be cases where the rule should be relaxed, as where the deposition is returned at so brief a period before the trial as to preclude a proper examination, and prevent a motion to suppress. In this case there was no occasion for any such relaxation of the rule, and had the objection been taken before the trial—either at the examination of the witness or on a motion to suppress—to the proof of the copy without producing the original or showing its loss, the opposite party would undoubtedly have secured the production of the original, if in existence, or, if it be lost or destroyed, been prepared to account for its absence.

JUDGMENT AFFIRMED.

[See *infra*, p. 175, *Blackburn* v. *Crawfords*, 4.—REP.]

CLIQUOT'S CHAMPAGNE.

1. The provision in the Revenue Act of March 3d, 1863—that when foreign goods brought or sent into the United States are obtained otherwise than by purchase, they shall be invoiced at the "actual *market value* thereof at the time and *place* when and where the same were procured or manufactured"—does not mean any locality more limited than the *country* where the goods are bought or manufactured. The standard to be applied is the principal markets in that country. Hence proof of the market value in Paris of wines made at Rheims, a hundred and more miles off, may be given; there being no other evidence on the subject.
2. The provisions in the 70th and 71st sections of the Revenue Act of 1799, by which when a probable cause of forfeiture is made out to the satisfaction of the judge trying the case, the *onus* of proving innocence is thrown upon the claimant, apply to the act of 3d March, 1863, though not in terms adopted by it; neither of the said sections having been ever repealed, and this rule of *onus probandi* having been always regarded as a permanent feature of our revenue system.
3. The expression in the act of 3d March, 1863, "If any owner, consignee, or agent shall *knowingly* make an entry of goods, &c., by means of any false invoice, certificate, or by means of any other false or fraudulent document," &c., means if such person shall make such entry, &c., of

Statement of the case.

goods knowing that the invoice, &c., does not express their actual market value—swearing falsely and knowing it,—and the expression as used in the act refers to the guilty knowledge on the part of either the owner, consignee, or agent; the act of an agent or consignee being the act of the guilty principal.

4. Prices-Current obtained from the agent of a manufacturer or from dealers in the manufactured articles generally, and which have been prepared and used by the parties furnishing them in the ordinary course of their business, are so far evidence of the value of the articles mentioned in them as that they may be submitted to the jury as "throwing light" on the matter; as "some guides to candid men," and for their "consideration." And this rule was held to apply so far as that the *comparative* value, at the town of manufacture (Rheims) and at the capital of the country (Paris), of champagne wines made by one manufacturer (Cliquot), was allowed to be shown by the Prices-Current giving the value of that made by others (Mumm, Moet & Chandon); it not appearing—either by evidence in the case set forth in the bill of exceptions, or by an admission of the judge upon the bill, that such evidence was given—but that the articles were the same in price, kind, and quality.

5. Whether there is sufficient proof of agency to warrant the admission of the acts and declarations of the agent in evidence, is a preliminary question for the court.

6. Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as a civil case, in all respects, as if the principal were the actor and the speaker.

7. The proviso in the act of 3d March, 1863, that its provisions shall not apply to invoices of goods, &c., imported from any place beyond Cape Horn or Good Hope until 1st January, 1864, does not apply to cases of fraud. If the guilty means were used after the act took effect, no matter when they were prepared, the offence is complete: revenue laws not being penal laws in the sense which requires them to be construed with great strictness in favor of the defendant. They are remedial laws, rather.

As is generally known, champagne wine arrives from France in large quantities into the United States. Some of it is "imported," that is to say, persons here purchase it in France and have it brought here. Large quantities, however, are sent here by the manufacturers of the wine resident in France.

The wine region itself—the ancient province of Champagne—is a small district in the northeast of France, of

which the ancient, decayed, and deserted cathedral city of Rheims—lying to the side of the great thoroughfare of travel from Paris to Strasburgh—is the capital. The region is largely owned by particular persons, Moet and his partner, Chandon; Mumm, Heidsick, Jaqueson, and the family of Cliquot: most of whom reside about here, but who with all the leading champagne manufacturers have agencies in Paris; they themselves not commonly attending to details of the "*commerce;*" though perhaps responding—some of them—from the spot, to communications addressed to them on the subject of their wines; referring also sometimes to their agents at Paris or abroad.* Different manufacturers supply different countries, Eugene Cliquot sending large quantities to the United States, Jaqueson to Russia: different countries having different tastes.

From an early day the government has directed its attention to making the revenue laws in a form that the collection of duties *ad valorem* should operate uniformly: and by statute of March 3, 1863,† it enacts that when goods brought or sent into the United States are obtained in any other manner than by purchase, they shall be invoiced at "the actual market value thereof *at* the *time* and *place* when and where the same were procured or manufactured." And, after providing that the invoices shall be made in triplicate, and that the manufacturer shall swear to one before the consul nearest to the place of shipment, the act goes on to say (§ 1), that "if any such *owner*, *consignee*, or *agent* of any goods shall *knowingly* make an entry thereof by means of any false invoice, or false certificate, or by means of any other false or fraudulent document, &c., or fraudulent practice or appliance, said goods shall be forfeited:" *Provided*, "that the provisions of the act shall not apply to invoices of goods, wares, or merchandise imported from any place beyond Cape Horn or the Cape of Good Hope until the 1st of January, 1864." The operation of another part of the act pre-

* See *infra*, Fennerstein's Champagne, p. 145.

† Ch. 76; 12 Stat. at Large, 787.

scribing the mode of making up invoices was postponed by a part of § 1 until July 1, 1868.

The statute enacts also (§ 3) that any person guilty of *knowingly* doing what makes the goods subject to forfeiture shall be liable to fine and imprisonment.

With this act in force and with numerous persons sending champagne wines from France, the revenue officers of the United States, as it seemed from the general aspect of this case, were impressed by an idea that the invoices were below the usual French prices of the wine; and indeed that there existed perhaps an extensive combination abroad to defraud our revenue. They determined to inquire into it, and if existing, to expose and break it up. They supposed the wines to be invoiced at the cost of manufacture merely, with a fraction added; not at the "market value" of them anywhere.

They accordingly employed, as it seemed, a naval officer, Mr. Farwell, to investigate the matter secretly in France. Farwell was not a manufacturer of nor dealer in champagne wines, nor an expert as to the price of them. He never visited the champagne region, nor Rheims, of course, at all. His whole sojourn in Europe was three months, and most of his time in France was passed in Paris.

While in that city he went to the store of a certain Jean Petit & Son, whose place of business was No. 7 Rue de la Mecorcher, who had champagne wine for sale, and who stated that they were the agents of Cliquot. They were generally reputed to be such agents, and had a sign to that effect outside the door. Farwell could find no other persons acting as agents for them. Cliquot, in fact, in a deposition of his, taken at a later date, stated that this firm "was the agent for the sale of the champagne manufactured by him." Farwell examined the wines which Petit & Son had for sale, inquired the price per bottle, and also the wholesale prices of these, and of the different qualities of Cliquot's wines, for shipment to England; which prices Petit & Son stated; the same being five per cent. less than the prices named on a printed Price-Current which—not anticipating, perhaps, ex-

actly the use to which the document might be applied — they readily gave him. The document read thus:

PRICE-CURRENT.

CHAMPAGNE WINES.

Fine wines of the house of Cliquot, of Rheims, Bouzy Mousseux, 1st quality, half dry, ...	Fr. 5	the bottle.
Fine wines of the house of Ellicquot, of Rheims, Bouzy Mousseux, 1st quality, very dry, ...	Fr. 5	"
Fine wines of the house of Ellicquot, of Rheims, Bouzy Mousseux, 1st quality, sweet, ...	Fr. 5	"
Carte Blanche Ne Plus Ultra, ...	Fr. 7	"

WINES MARKED JEAN PETIT & SON.

Di Mosseux, half dry, ...	Fr. 3.50	"
Sillery Mousseux, half dry, ...	Fr. 4	"
" very dry, ...	Fr. 4	"
" rose color, ...	Fr. 4	"
Bouzy et Sillery, dry, not sparkling, ...	Fr. 5	"
Red wines of Verzenay, ...	Fr. 5	"

Sparkling wines at very low prices for exportation. Return of duties for the outside of Paris, or for foreign ports.

He was informed, however, that he could obtain the *wines for exportation upon better terms from the manufacturer at Rheims.* The highest priced wines shown him were *put up and labelled* precisely like the best of the Eugene Cliquot wines imported into San Francisco. Farwell inquired of several agencies for champagne at wholesale for exportation, and the agents uniformly stated their prices. Among the places at which he called was the house No. 6 Provence Street, on the outside of which was a sign,

"DELENGE RAGOT, OF THE FIRM OF MINET & Co., RHEIMS."

The proprietor here showed him samples of different wines, stated their wholesale price, and gave him, as Monsieur Petit & Son had done, a Price Current. The document, varying from the last only in the new sorts of its principal subject, read thus:

PRICE-CURRENT.

Delange Ragot, of the firm of Minet, Jr. & Co., Rheims—Paris, No. 6 Provence Street. From 2 to 6 o'clock.

FINE CHAMPAGNE WINES.

Carte d'Or,	Fr. 6.00
Carte Blanche,	Fr. 5.00
Choice Bouzy,	Fr. 4.50
Excellent Verzenay,	Fr. 4.25
Exquisite Sillery,	Fr. 4.00
Partridge's Eye,	Fr. 3.75
Foaming,	Fr. 3.50
Superior Ay,	Fr. 3.00
Extra fine Tisane,	Fr. 2.50

GOLD-SPANGLED CHAMPAGNE, PATENTED.

Imperial,	Fr. 6.00
Excellent Boizy,	Fr. 5.00
Sillery,	Fr. 4.00
Verzenay,	Fr. 4.00
Ay,	Fr. 3.00

Price at Rheims, package included.

Fortified with the results of his tour, Mr. Farwell came back to the United States; and custom-house officers having compared the prices at which great quantities of champagne wines sent here by foreign manufacturers were invoiced, with the prices which his two "Price-Currents" showed as prices at the places he asked at in Paris, and with other evidences of actual market value abroad, resolved to invite judicial inquiry. They accordingly made extensive seizures of champagne, in New York, San Francisco, and other ports.

The present suit concerned the wines of Eugene Cliquot alone. These had been made at Rheims. The invoice was dated 5th September, 1863. The wine itself was shipped in that same season, and arrived at San Francisco in February, 1864, where it was seized and libelled in the District Court for the Northern District of California. The libel set forth that the owner of the champagne had consigned it to one Borel, and that Borel, by *his attorney in fact*, De Rutle, had entered it. The charge was, that in making this entry, the consignee had "produced and used an invoice which did

not contain a true and full statement of the actual market value of said goods and merchandise at the time and place when and where the same were procured or manufactured; but that, on the contrary, as the said owner well knew, the said invoice was false, and that the market value of said goods and merchandise was much greater than the sums and prices stated in said invoice." The prosecution was founded upon the already mentioned* act of March 3d, 1863.

It is here requisite to state that, by a statute of 1799,† it was enacted (§ 70) that it should be the duty of the several officers of customs to make seizure of any goods liable to seizure, "by virtue of this *or any other* act of the United States which is now or *may hereafter be enacted*, as well without as within their respective districts." And, by § 71, that where any seizure should be made, pursuant to *this* act, "the *onus probandi* should be upon the claimant, provided probable cause was shown for the prosecution, to be judged of by the court before whom the prosecution is had."

The case was tried before Mr. Justice Ogden Hoffman and a jury—the claimant setting up in reply to proof that the wines were invoiced at cost of production (which sort of valuation the government alleged to be in violation of the statute, and ground of forfeiture), that it was proper so to value them, since Rheims was not in the least degree a commercial place, and the wines had no actual market value there; a fact denied, on the other hand, by the government, which sought to infer a contrary conclusion by proofs that the manufacturers did sometimes deal in them from Rheims itself.

However, among the facts relied on by the government, in support of their libel, were the prices in *Paris;* and with a view of getting before the jury the results of Mr. Farwell's tour, various questions were asked of him and answers made, exceptions being taken on the bill (which, however, did not set out *all* the evidence) to these particular inquiries, and the matters given in response. They were thus:

* Supra, p. 116.

† 1 Stat. at Large, 768.

"What did you ascertain, if anything, concerning the price or value of Eugene Cliquot champagne? Did you ascertain what was the jobbing or wholesale price at Paris? What means did you take to ascertain the price or value, and what was the result of your investigation?"

The witness answered:

"I went to the agents of Eugene Cliquot, Jean Petit & Son, whose place of business was No. 7 Rue de la Mecorcher. They had wines for sale, and stated that they were the agents of Eugene Cliquot, of Rheims, for the sale of his wines. They were generally reputed to be such agents, and there was a sign to that effect outside the door. I examined the wines there which they had for sale, and inquired the prices per bottle, and also inquired the wholesale prices for shipment to England and elsewhere. The agent stated to me the different prices."

The defendant's counsel objected to the witness testifying what Petit & Son stated to him in regard to the prices of champagne as inadmissible and incompetent, on the ground that it was hearsay, and that there was no evidence that Petit & Son were the agents of Cliquot, the claimant.

The court overruled the objection.

II. The witness having produced and identified the Price-Current given him by Petit & Son, the government offered it in evidence. The claimant objected on the grounds,

"That the evidence was hearsay, irrelevant, and immaterial; that the paper did not purport to state the wholesale price at Paris of the wines mentioned in it, but merely the price of a single bottle; that no actual transaction on the part of Farwell, or any one else, had been proved, or was proposed to be proved, to have been based on such paper or on the prices stated in it; that the paper had not in any manner been connected with the claimant, and that the wines mentioned and stated in the paper did not appear to be, and had not been proved to be, of the same quality as those proceeded against in this action."

The court, however, admitted the Price-Current.

III. The witness further testified:

"That almost all the leading champagne manufacturers have agencies in Paris; that he inquired of several agencies for champagne at wholesale for exportation, and the agents uniformly stated to him their prices; that he could find no agents for Eugene Cliquot at Paris, other than said house of Jean Petit & Son. That among other wine-dealers in Paris was the house No. 6 Provence Street, on the outside of which was a sign, 'Delenge Ragot, of the firm of Minet, Jr., & Co., Rheims.' That he called at said establishment, and was shown by the proprietor samples of various wines, who stated their wholesale prices; that he was also at the same time handed a printed Price-Current, which he now produced."

To this testimony the same objection was made that was made to the last; but it was received; the Price-Current being the second of those already mentioned.

IV. Farwell was also asked:

"Did you, upon inquiry at Paris, ascertain the difference in price between Rheims and Paris, as to Mumm champagne and Moet & Chandon champagne?"

To which question the claimant objected, as calling for irrelevant and immaterial testimony; also, because it referred to champagne wines, different in kind, price and quality from those wines the subject of this suit.

But the court allowed the question.

The testimony being closed, the counsel for the claimant asked the court to give the jury the following instructions:

"1st. That any valuation set by the claimant on his wine, or any offer by him to sell his wines at a price fixed by him, is not evidence of the fair market value, or of the usual buying and selling price of his wines, unless he was in the habit, at the place of manufacture, of selling his wines at such valuation or price."

Which instruction the judge refused to give; but charged that such offer was evidence, but not conclusive; that an isolated offer to sell had no great weight; but if corroborated

by other testimony, and in the absence of any evidence of sales or offers to sell at a lower figure, it was worthy of consideration by the jury.

"2d. That the market value, at Paris, of wines manufactured by the claimant, is not to be taken by the jury as the fair market value of the wines in controversy in this case, unless these wines were manufactured in Paris."

Which instruction the judge also refused to give; but charged, that though the value required to be stated in the invoice was the market value at Rheims, yet the market value at Paris, if established by the evidence, was a fact which might be considered as tending to show the market value at Rheims.

"3d. That the law only punishes by forfeiture the attempt to defraud the revenue or evade the duties, and, therefore, if the jury shall believe that the claimant in this case has made up his invoice of the wines in controversy through a *doubt* of the requirements of the law or of its meaning, and not with a fraudulent design, their verdict must be for the claimant."

Which instruction the judge refused to give; but charged as is hereinafter set forth.

"4th. That the invoice in this case having been made out on the 5th day of September, 1863, and the wine mentioned therein having been shipped from Bordeaux in the year 1863, therefore the act of Congress passed on the 3d day of March, 1863, is not applicable to such invoice or to the goods mentioned therein, even though the goods arrived at the port of San Francisco in February, 1864."

Which instruction was refused, on the ground that it would be an incorrect instruction.

"5th. That if there was not an actual market value, that is, wholesale market value, for manufactured champagne at Rheims, at the time the invoice of the goods in question was made out, then the claimant was justified in expressing in said invoice the value of these goods at their actual cost to the manufacturer."

Which instruction the judge also refused; but charged as is hereinafter set forth.

"6th. That the jury cannot find these wines should be forfeited, as undervalued in the invoice, unless they are satisfied that the claimant, in valuing the wines in the invoice, *fraudulently* undervalued them."

Which instruction also the judge refused; but charged as is hereinafter set forth.

"7th. That if Borel was the consignee or agent of the wine, and entered the same at the San Francisco custom-house, upon the invoice presented here, then it cannot be forfeited unless the said Borel made, or caused to be made, the said entry, knowing or believing the invoice to be false."

Which instruction also the judge refused; but charged as is hereinafter set forth.

"8th. That if De Rutle acted as agent of Borel in entering the wine upon the invoice presented here by the plaintiffs, then the wine cannot be forfeited unless the said De Rutle made the said entry knowing or believing the invoice to be false."

Which instruction the judge refused; but charged as is hereinafter set forth.

"9th. That that section of the act of Congress of March 2d, 1799, which provides, that where probable cause is shown for the prosecution, the *onus probandi* shall lie on the claimant, has no application to this cause."

Which instruction the judge refused; but charged as is hereinafter set forth.

"10th. That the word *knowingly*, in the first section of the act of March 3d, 1863, means, in connection with the language which accompanies and surrounds it, *fraudulently*."

Which instruction the judge refused; but charged as is hereinafter set forth.

The judge thereupon charged the jury at large; extracts from the charge being in substance as follows:

GENTLEMEN OF THE JURY: This case involves the inquiry as to the basis on which *ad valorem* duties are to be estimated, in all cases, upon Champagne wines.

The law of 1863, under which you are proceeding, in effect punishes the entry of goods at the custom-house, or the attempt to enter them, by means of an invoice which shall not contain a true statement of the actual market value of the goods. It is alleged here, on the part of the plaintiff, that this invoice did not contain a true statement of the market value of the goods, and on the side of the claimants it is alleged that it did. The inquiry, therefore, presents itself: What is the "actual market value," in the sense of that statute?

The market value of goods is the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade. You will perceive, therefore, that the actual cost of the goods is not the standard. On the contrary, that having been the standard, the law has been changed, and for the standard of the cost has been substituted another standard, to wit, the actual market value.

The United States insist that they have shown that the actual market value of these goods is much greater than the prices at which they are invoiced.

The defendant asserts that there is no actual market value at Rheims, the place where the goods are produced, as determined by sales; and that the only way to arrive at the market value is to take the cost of production, to compute how much the manufacturer has actually disbursed in producing the goods, and that thus you have the actual market value. The United States, however, maintain that though the manufacturer of these goods may not ordinarily sell them for consumption at Rheims, and though there may be no persons at that place who buy the goods for the purpose of disposing of them at that place, yet they are freely offered to all the world, and held at known and established rates; that they are sold by the manufacturers to any one who may apply by letters addressed to them or their agents through-

out Europe, and can be obtained, and only be obtained, at certain fixed rates, at which they are held by the producers of the goods, and at which they are ready to furnish them to all the world. If this latter state of facts be true, then it is evident that the prices at which the producers so hold them are the market prices, within the meaning of the statute, under any rational interpretation which can be given to it.

The United States have also offered in evidence various Prices-Current. These were obtained, I understand, from dealers in wines in Paris. Of course, if you believe that these merely indicate the retail prices of some grocer, or of some *cabaret*, or drinking shop, where some one sells wine by the bottle, or the half bottle, or the drink, or even two or three bottles, they will be but slight guides to you in estimating the market value of wines at wholesale. On the other hand, if they appear to be statements of the prices at which wines are held by dealers in Paris, a city which is within a few hours of Rheims, the place of production, and in some instances, if it be so, by the agents of these manufacturers themselves, then they do throw light on the market value of wines. If the place of manufacture were at San José, the prices offered or demanded here at San Francisco for wines, as indicated by the Prices-Current, would be some guide to a candid man as to the market value of the goods at San José. I am unable to see why the testimony should be rejected. It is before you for your consideration. The "price current" is, as nearly as one can get at it, the price which the manufacturer himself demands, if it is the price which his agent asks, and offers to deliver the wine for, at Rheims or at Paris.

With regard to the question of intent, I am asked to charge you that you should be convinced that these goods, if invoiced below their market value, were invoiced fraudulently below their market value. The previous statutes passed by Congress had introduced in many instances the word "fraudulently," had defined the offence to be, making a false invoice "with intent to defraud" the revenue, or evade the payment of duties. This statute, apparently *ex industriâ*, omits these expressions, and substitutes the words "if the owner," &c., "shall knowingly make an entry by means of any false invoice," &c. I do not feel at liberty, when the legislature has left out the word "fraudulent," and inserted the word "knowingly," to reinstate the word "fraudulent." At the same time I am bound to say that I can-

not conceive any case where an entry could be knowingly made by means of a false invoice unless it were fraudulently made. I do not tell you in terms that you are obliged to find that the entry was made fraudulently, but you are obliged to find that it was made knowingly by means of a false invoice; and for myself I cannot imagine any case where it could be knowingly done without being fraudulently done. What, then, shall we understand by this word "knowingly" as here employed? It is that in making out this invoice, and in swearing before the consul that such was the actual market value of the goods, the claimant knew better, and that he was swearing falsely. He forfeits these goods if you believe that he knew this invoice did not express their market value—their actual market value.

By the legislation of the United States it is established that in revenue cases, where the government has shown probable cause, the *onus probandi*, or burden of proof, is on the part of the claimants to prove the facts necessary to be shown in their defence. Under that rule of law, or rather provision of the statute, I am bound, at the request of the district attorney, to say that, in my opinion, the United States has proved probable cause, and it is for you to say whether the claimants themselves have made out their defence; whether they have shown that the goods were invoiced at their real market value at Rheims.

To that part of the charge instructing the jury that the plaintiffs having shown a probable cause, the burden of proof was on the claimant, the claimant's counsel excepted.

The jury found for the government; and the case, after judgment, came here by writ of error; it being understood that other cases, to very large amounts, and claims for back duties, would be regulated by the decision here.

Mr. D. B. Eaton, for the claimant, Cliquot: Beginning with the matters excepted to in the order given them in what precedes:

I. It will be observed, in regard to the three questions, which are the matter of the first exception, that they refer to no particular time or place, but comprehend all times and all places of the world, and refer to price as well as to value; that no specific brand or quality of wine is referred to, ex-

cept that the question refers to "Eugene Cliquot Champagne," and that no source of information is suggested to the witness. The "actual market value" at Rheims, or even the market *value* at Paris, is wholly disregarded.

In the third question the vagrant naval officer is asked to state what, on the whole (in his opinion, of course), was the "*result of the investigation?*"

II. The Price-Current, said to have come from Petit & Son, is confined exclusively to "*fine* wines." The great disparity in price between the wholesale and retail prices of champagne, and between a "fine" and the average article, is well known. The paper, on its face, makes a great disparity of price between its retail price for *fine* wines in Paris and the usual wholesale price for the wines of exportation; for it says: "Sparkling wines, at *very low* prices, for *exportation.*" The two prices are placed in *contrast*, and the statement quoted from the paper adds significance to the declaration of the witness, that he was told that "he could obtain wines for *exportation* upon *better* terms from the manufacturers at Rheims."

Upon this testimony we say generally—

That upon the basis of general commercial dealing, these papers should have been treated as no standard of reference upon the question in controversy. The officer should have gone to Rheims for wholesale prices for foreign shipment, and not have confined his inquiries to the brilliant shops of an inland capital, so far away from all the highways of foreign commerce. It cannot be maintained that the great amount and average quality of wines sent for wholesale disposition to a new country like California should be presumed by the court to be of the quality one might find in Paris, that great resort of the rich, the extravagant, and the fastidious from all the nations of the globe.

It is most important, too, to note that no actual transaction was either made or proposed to be made. The inquiries of Farwell had the aspect of inquiries made *en amateur*. He was not a dealer in champagne; not a trader of any kind.

Argument for the claimant.

He had not, so far as appears, even as much knowledge of champagne wines as that possessed by a man fond of them and of discriminating taste. He walks into a shop and asks prices simply. Petit & Son saw of course that he was an inquirer merely; one of the large class who are the pest, and not the profit, of the dealer. Every one knows how differently any dealer talks in such a case from what he does when there is really an *affaire* on hand. The difference is great in all countries. It is very great in all the countries of Southern Europe, especially with foreigners, most of all English and Americans. In Italy two prices are usually asked. In France less, but still more than the price expected. The theory of the practice is said to be that, in coming down from his first demand, the trader shows that he has a special esteem for his particular customer; but, whatever be the cause, the fact that a price is almost universally asked higher than will be taken from a *bonâ fide* customer,—a customer who with the cash in his hand comes to *buy*,—is notorious. Farwell made no offer whatever to anybody.

III. *As to the third matter:* There is nothing to indicate that the house of Delenge, Ragot & Co., or its wines, had any relation to the wines or house of the claimant, or with Rheims even, except that the name, Rheims, appeared on the sign. The paper was received on the theory that any paper from any Paris wine merchant proved its own contents, and was also competent and relevant evidence of the actual market value of Eugene Cliquot's wines at Rheims, in September, 1863.

It should also be noticed that neither of these Prices-Current is dated, or stated to refer to any date, nor is there anything in the record to show whether either is intended to give the current retail prices at one time or at another. The second Price-Current shows plainly that it relates only to the retail rates of a gay, fashionable Paris cafe; and can have no relation to the wholesale basket market value of the common wines of exportations a hundred miles away, at Rheims.

One class of its wines is headed: "Fine Champagnes, *Carte d'Or*;" *Excellent* Verzenay, EXQUISITE Sillery; the other: "*Gold-spangled* Champagnes, *Patented*."

IV. *Fourth Exception.*—The counsel for the government seems to have been troubled withal by an impression that Paris prices, if they could be given in evidence at all, needed some testimony to accompany them, tending to show the relation they bore to prices at Rheims, and he therefore attempted to show that relation; to show, at least, the relative prices, at Rheims and Paris, of *some* of the wines mentioned in one or the other of his Prices-Current. For if he could do that, and could also be indulged in a general latitude as to the admissibility of testimony, he could argue back and forward, as to the effect that the difference in Paris and Rheims price of champagne in controversy was very likely—at least, just as likely as otherwise—the same as was illustrated, in respect to the particular kind of wines, concerning which he had made some proof. There is an answer, however, to his conclusions.

(1.) That there is no natural or logical relation between the several kinds and brands of champagne, such as to warrant the inference that there was only the same disparity of prices in the two places, as to the one, as there was as to the other.

(2.) That there is *no proof* anywhere, of the price or value of any kind or quality of wine at Rheims, except that given in the claimant's invoice, as to his own wine.

And when the counsel attempted to make his proof, he failed; because the naval officer had omitted to ascertain any fact, or even to bring any Price-Current relating to the relative price, at the two cities, of any of the kinds or quality of wines mentioned in the Prices-Current in evidence, or of the relative prices, in those cities, of the wines in controversy.

Hence "Mumm's Champagne," and "Moet & Chandon Champagne" were resorted to for the comparison deemed necessary.

This evidence was objected to, because the inquiry was

Argument for the claimant.

irrelative; because the testimony, if given, would be hearsay, and because the champagne referred to in the question was of a different kind, price and quality from that in controversy.

Now, adverting to this question (on p. 122), we say:

(1.) The answer would plainly be mere hearsay testimony, and open to every objection, substantial and technical, which can apply to any such testimony. It does not appear of whom, or when, or even in what part of Paris the report he is allowed to relate was heard.

(2.) The only object of it, if admissible, would be to show that if the difference in price between Moet & Chandon's wine, or Mumm's wine, at Paris and at Rheims, is any given *percentage*, that therefore only the same difference exists as to that quality of Eugene Cliquot's wine now in controversy. But the inference is unwarranted. The two selected wines might have been of the first quality, of which but a small amount was made, and that especially for the fashionable *cafés* of Paris; and in that event the market of Rheims could hardly be much below that of Paris. The facts might be very different as to other wines, such as those made especially for the English, Russian, or American markets. The evidence was designed to, and doubtless did, have the effect of causing the jury to think that they might assume the market of Paris and that of Rheims, as to champagnes generally, to be about equal. And from this basis, the jury were induced to take the unwarranted step to a verdict, viz., that all champagnes were nearly of a value, and hence, that from the rates given in Prices-Current, they might conclude that the valuations in the invoice in controversy were too low, and therefore fraudulent. Short of this argumentative process, all the testimony of the naval officer is wholly irrelevant.

To tell the jury, as the court did, that these Paris retail prices were but "some guides," that they were matter for their "consideration as candid men," and that they threw a certain "light" on the subject, does not alter the case. It was to allow them, at their option, to be guided in the ver-

dict solely by what were false guides, fanciful evidences, and illegal standards of prices and value.

The value of wines at Rheims should have been proved under a commission sent there, in which experienced merchants could have sworn as to the "*specific fact*" of the value of champagne, at the date of the invoice. How much of the testimony objected to rests on the credit to be given to Mr. Farwell? Does not his whole story rest on the veracity and competency of some other person, who gave him the Prices-Current, and on general rumors?*

Prices-Current are no doubt often admitted in evidence. But it must appear, before they are (1.) That dealers in the articles therein referred to are in the habit of giving credence to them. (2.) That it is generally understood and admitted to be a report of actual transactions and real prices.† In this case nothing of the kind appears. General advertisements in newspapers all will admit cannot be read in evidence.‡ Yet these Prices-Current are exactly what appear daily in all papers of commercial towns.

It may, indeed, be stated generally of the theory of foreign evidence on which this case was tried, that it supersedes the necessity of producing witnesses for examination or cross-examination; that it relieves litigants of the trouble and expense of sending commissions to foreign countries, as has heretofore been customary; that it avoids the labor and trouble of looking up persons who are experts in peculiar occupations, or who have personal knowledge of facts. All that need be done is to send some subaltern officer abroad, or to solicit the services of some needy tourist, who can, with little trouble and without departing from the places of fashionable resort, note in his diary the hearsay of hotels and cafés, and fill his portfolio with bills of fare and Prices-Current, touching, as near as may be prudent and

* See 1 Starkie on Evidence, pl. 2, § 55, pp. 180, 181; Morris v. Lessee, &c., 7 Peters, 554.

† Henkle v. Smith, 21 Illinois, 238.

‡ Sweet v. Avount, 2 Bay, 192; see also Freeman v. Baker, 5 Carrington & Payne, 475; Wetmore v. United States, 10 Peters, 647; Harris v. Panama R. R., 3 Bosworth, 7.

convenient, the matters, places, and times in controversy; and then, when any litigation arises, no preparation is needed, but a perusal of the diary and selections to match from the portfolio. "Murray" or "Appleton," we submit, would be just as good, and perhaps better evidence.

Mr. Eaton then examined articulately and with searching comment the different instructions to the jury. Many of them, he argued, were their own argument. On some he commented at large.

Request No. 5 (*supra*, p. 123). In view of the question raised before the jury, as to there really being "an actual market value" at Rheims for the wine in question in 1863, it was necessary to give them instructions to apply, in the event that the jury should find that there was no such market value; and, therefore, the request states a rule *for that event.* We assert that this rule was necessary, and is the true one.

The statute says, the invoice must give the "actual market value *at* the place," &c., of the article invoiced. Now suppose (as this request did) there was no such market value, by reason of its being the *first of the article ever made at or near the place;* what is to be the guide or rule in making the invoice? An unknown and impossible standard, in the contingency of there being no actual market value, is laid down in the statute. What does the spirit and intent of the law require? Will the courts lay down no rule, and leave the honest manufacturer to the custom-house officer? Is there, in the nature of the case, any other rule that can be laid down in such contingency but the one stated in the request?

Let us suppose that the jury did find that the wine in question had no "actual market value" at Rheims when the invoice was made; and further, that it was invoiced at cost, then the whole verdict would depend on the ruling on this single request: "Was the manufacturer guilty of fraud or not in invoicing the wine at cost, in case there was no actual market value for it at Rheims, at the date of the invoice?" It is, therefore, a question on which this court is called upon to express its opinion.

This request for instructions goes to the foundation of the alleged fraudulent intent. If Eugene Cliquot believed he might fairly make the invoice as he did, or believed that there was no market value for champagne in Rheims; or if, in fact, there was no such market value, then no fraud can be predicated of the transaction.

Request No. 9 (*supra*, p. 124), relates to the *onus probandi*. The judge below applied the provision of the act of 1799 to this case, and decided that the government had shown probable cause, and that, therefore, the *onus probandi* (or *desprobandi* rather, as it is), rests on the claimant.

The § 71 of the act of 1799 (the source of this doctrine of *onus probandi*) is confined to suits brought or seizures made (in its own language) "pursuant to *this* act;" *i. e.* said act of 1799. Has it been considered as applying to suits followed by seizures under any other act, except where it had been by law extended to suits thereunder? We think not. It has been decided repeatedly, in the Southern District of New York, that it did not apply to a revenue act of 1830, a statute which refers to the act of 1799, and apparently adopts it more than does the act of 1863. In one case,* Smalley, J., said:

"I have already once this term ruled that the 71st section of the act of 1799 does not apply to the act of 1830. I have not ascertained that the question has been before any court, or been passed upon; but the more reflection I have given to that question induces me to adhere to my first opinion, that the 71st section of the act of 1799 does not apply to the act of 1830. I do not think the court are warranted in extending that peculiar provision which changes the whole burden of proof from the penal statute."

It is not to be presumed that so oppressive a rule as the one in question will be extended by construction or inference. It is against the theory of the American law, and has no foundation in the general principles of justice; and there is no statute authority for applying it to an action under the act of 1863.

* United States v. 1406 Boxes of Sugar. Before Smalley, J., June 26, 1862.

Requests Nos. 6, 7, *and* 8 (*supra*, p. 124). The act of 1863 declares (§ 1) that if any *owner*, *consignee*, OR *agent* of any goods, &c., shall *knowingly* make or attempt to make any *entry* thereof by means of any false invoice, &c., or by means of any *other false* or fraudulent document, or of any *other* false or fraudulent practice or appliance, said goods, wares, or merchandise, or their value, shall be forfeited.

It should here be noticed that this section, in making *new provisions* as to *entries*, refers and relies on the old and familiar ones as to *invoices*. Hence the words "*false* invoices" and "*other* false or fraudulent appliances" are used. For the meaning of a false or fraudulent invoice, &c., we are, of course, to look to the acts of 1799 and 1830, which have been so often adjudicated.

The § 3 makes any person guilty of *knowingly* doing what makes the goods subject to a forfeiture liable to fine and imprisonment.

It may be remarked of the foregoing citation relative to the "entry," &c., from the § 1 of the act of 1863:

(1.) That it is the only clause of said act upon which it can be pretended this suit can be maintained.

(2.) That it is confined solely to wrongful *entries*, or attempts to make them, and does not forbid or attach any forfeiture or penalty to the making or to the attempt to make a false or fraudulent *invoice*. However false an invoice may be, and however fraudulent the intent with which it may have been made, no proceedings can be based thereon, and no consequences are declared to follow under the § 1 of the act of 1863.

(3.) The "owner, consignee, and agent" seem to be treated as distinct persons (at any rate, as that is the construction most unfavorable to the claimants, it will be that especially considered), so that the act of either may cause a forfeiture of the goods.

And the § 3, by the use of the words "any person," appears to make each and all of them liable to be punished criminally.

It follows, that if the act of either of the said three classes

of persons may work a forfeiture, that the act of each is to be taken as a whole and by itself. It cannot therefore be argued that what the agent *personally does* is (on any theory of the law of principal and agent) also done by the owner or consignee, by or through the agent.

The word "knowingly" clearly applies to all the means of procuring an entry to which a forfeiture is attached, as if repeated under each category. And whether the same is done by the owner, the consignee, or the agent, it must have been done "knowingly" by either, or no forfeiture is denounced.

It would seem clear that the goods cannot be forfeited by reason of the act of a consignee or agent of the owner, without proof of such acts by such agent or consignee as would render them or one of them liable to be punished criminally under the § 3. And it will not be pretended that an agent or consignee can be punished by imprisonment for "effecting an entry of any goods" for less than value, by using a false or fraudulent foreign invoice, without proof that he did it knowingly. Whatever may have been done by Borel or De Rutle, Cliquot's champagne cannot be forfeited, he having acted innocently.

Request No. 4 (*supra*, p. 123), is founded on the last clause of the § 1 of the act of 1863. The language, already given, is as follows:

"And provided further, that the provisions of this act shall not apply to invoices of goods, wares, or merchandise imported into any port of the United States from any place beyond Cape Horn or the Cape of Good Hope, until the 1st January, 1864."

We contend that the meaning is, that the provisions of the act shall not apply to invoices of goods, wares, or merchandise imported into the United States from any place beyond Cape Horn or the Cape of Good Hope, when said invoices were made up at any time prior to the 1st January, 1864.

Now, what was the intent of Congress in employing and arranging these words as they are above quoted?

Argument for the claimant.

The act of 1863 was passed on the 3d March of that year, and the operation of that part of the first section prescribing the mode of making up the invoices was postponed until the 1st July following, for the evident purpose of allowing merchants or manufacturers in places *not* beyond Cape Horn or the Cape of Good Hope, four months' time, within which to become familiar with the new law. The period fixed, as to such merchants and manufacturers, was reasonable and just.

It is evident then that, in the body of the first section, the date of the invoice was intended to determine the question as to whether a given case would or would not fall within the law. By strict analogy, the same construction of the proviso must be adopted; and it must be held that the time there specified applies also to the date of the invoice, whether the strict letter of the proviso justified that construction or not.

In conclusion. It is impossible to admire the mode in which this proceeding was begun and carried on below. Mr. Farwell, not a manufacturer of nor dealer in champagne, no expert in its prices or qualities, and neither prepared nor intending to deal *bonâ fide*, or in fact at all, is sent abroad as a detective to ascertain the market value of it at the place of its manufacture. He visits Paris, but not Rheims, where the manufacture is, at any time. He gets Prices-Current of the sorts and in the way already commented on. They are never produced till the moment of trial, when the claimant, five thousand miles away, cannot possibly answer them; however capable he may be of answering them completely. They make "probable cause." The rules of evidence are inverted, and the *onus* rests on the claimant to prove his innocence.

For a long series of years, may it please the court, the trade in champagne wines between this country and France has been conducted upon the basis of the present valuations. No objections have been made and no notice given to the importers that any attack upon them was to be made or that any dissatisfaction existed with their invoices. Year after year there have been custom-house valuations based on the same theory of value as these invoices. The shippers have

thus been led to believe that this government did not object to these valuations, and have conducted their business with unsuspecting confidence. There is reason to believe that the invoices in question were made as those for ten years previously had been, and in the exercise of good faith. Of a sudden the custom-house officers, having sent one of their number abroad and carefully laid their plans, pounce down upon the unsuspecting importer and bring him to sudden condemnation, and impose upon him immense pecuniary losses. For it is not these cases alone and the large amount they involve that you are now to decide, but other large claims for forfeitures in San Francisco and New York are depending on their issue. And there are also claims for alleged back duties of immense amount.

This case does not illustrate that theory of official action that seems liberal to the subjects of a friendly maritime state, which is bound to the United States by so many grateful memories of her noble co-operation with us in the struggle of our revolutionary birth; nor does it seem to comport with those higher and more generous principles of national intercourse, between great commercial and Christian races, which have superseded that older doctrine which treated all foreign states and subjects as in the nature of enemies, and all revenue laws as occupying a domain within which courtesy, comity and justice were unrecognized and unknown.

The motives which this proceeding charge upon the owners of these champagnes are of a most offensive character, and no such charge can be warranted or sustained, except upon clear proof. There is no such proof in the case; and the enlightened mercantile community of Europe, to whom the reputable character of the claimants is known, will not willingly accept a judgment censuring their conduct, unless it shall have better foundation than deductions from inconclusive and unauthorized testimony.

To release the property seized, and to allow the proceeding thus far to operate only as a friendly admonition to the merchants of France, will enlarge the commercial dealings

between the two nations, increase the revenues of this government from foreign imports, and illustrate our appreciation of the good will and the generous policy that should characterize the commercial intercourse of friendly nations.

Chancellor Kent declares* that the "law of nations enjoins upon every nation the punctual observances of *benevolence and good will* as well as of justice towards its neighbors. This is equally the *policy* and duty of nations." It becomes the United States, and comports best with her historic fame, to assume the highest grounds of justice and liberality in her dealings with other nations. The spirit of her foreign intercourse, and the tone of her executive and judicial administration, should never fall below the justice and equity in which her laws and her constitution are founded. Let no European merchant ever be able to say with justice that the administration of the laws of the United States is not in harmony with the spirit of that great national charter which is the wonder and the aspiration of Europe, and the guarantee and the glory of America. If there is any nation that can afford to be, and ought to be, more just and lenient than any other in the administration of her revenue laws, that nation is the United States; and there never was a fitter era than the present, when she is standing forth, great, victorious, and merciful at home, to make that honorable preeminence manifest to the commercial world abroad.

Mr. Speed, A. G., and Mr. Lake, D. A. for California, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The exceptions presented by the record will be considered in the order in which they have been argued.

I. The defendant's counsel objected to the witness testifying what Jean Petit & Son stated to him—when he visited their place of business, No. 7 Rue de la Mecorcher—in regard to the prices of champagne. The testimony is objected to as inadmissible and incompetent, on the ground that it

* 1 Commentaries, 32.

was hearsay, and that there was no evidence that Petit & Son were the agents of the claimant.

The bill of exceptions does not purport to set out all the evidence given in the case. Whether there was sufficient proof of the agency to warrant the admission of the acts and declarations of the agent in evidence, was a preliminary question for the court to determine. If the proof was insufficient, an exception should have been taken upon that ground, and the evidence upon the subject embodied in the bill. This was not done. It appears, however, that the proof was sufficient. Besides other evidence, the fact was proved by the deposition of Eugene Cliquot, the claimant.

Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as in a civil case, in all respects, as if the principal were the actor or the speaker.*

II. The second exception was to the admission, in evidence, of the Price-Current furnished by the agent to the witness. Coming from that source, it was clearly admissible. It was not so remote in its bearing upon the issue as to be irrelevant. Its weight and application depended upon the other evidence in the case, which is not shown. We cannot presume error. It must be made manifest. The presumption is the other way.

III. The witness further testified, that almost all the leading champagne manufacturers have agencies in Paris; that he inquired of several agencies for champagne at wholesale for exportation, and the agents uniformly stated to him their prices; that he could find no agents for Eugene Cliquot at Paris, other than the house of Petit & Son. That among other wine-dealers in Paris was the house No. 6 Provence Street, on the outside of which was a sign, "Delenge Ragot, of the firm of Minet, Jr., & Co., Rheims." That he called at this establishment, and was shown by the proprietor

* American Fur Co. v. United States, 2 Peters, 364.

samples of various wines, who stated their wholesale prices; that he was also at the same time handed a printed Price-Current, which he produced on the trial.

The claimant's counsel objected to the reading of the Price-Current in evidence, on the ground that it would be hearsay, irrelevant, &c.; that it gave the prices but by single bottle; that no actual transaction was based on it; that the paper was no way connected with Cliquot; and that the wines did not appear to be the same in quality with those libelled.

Was the objection well founded?

In *Lush* v. *Druse*,* the proof upon the trial, in the court below, was as follows: "A witness proved the value of wheat in Albany, in 1822, '23, '24, and '25, derived by him from the books of large dealers in wheat, at that place, he knowing nothing of the price of his own knowledge." The court said: "The proof was by a witness who had inquired of merchants dealing in the article, and examined their books. This, uncontradicted, was sufficient." With this ruling we are satisfied. While courts, in the administration of the law of evidence, should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy—itself a serious evil—without giving any additional safeguard to the interests of justice. We think the Price-Current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness, both of which were admissible upon the authority of the case referred to in Wendell. It was clearly relevant. What effect it should have, in connection with the other evidence adduced by the parties, was a question for the jury.

IV. The counsel for plaintiff asked Mr. Farwell, at the trial, whether, upon inquiry at Paris, he had ascertained the

* 4 Wendell, 313.

difference in price between Rheims and Paris, as to Mumm's champagne, and as to Moet & Chandon's champagne?

The question was objected to, "as calling for irrelevant and immaterial testimony; also, as calling for hearsay testimony; also, because it referred to champagne wines different in kind, price, and quality from those wines proceeded against in this action."

Whether the wines named were the same with those in question of the claimant, except in name, or not, and if they differed in quality and price, to what extent they differed, is not disclosed in the bill of exceptions. If there were such differences as was assumed by the counsel for the defendant, it should have been made to appear, by setting out either the evidence which proved it, or an admission by the judge to that effect. Either would have been sufficient. Their place cannot be supplied by the allegations of counsel. The silence of the judge does not amount to an admission. The other grounds of the objection are sufficiently answered by what has been said in considering the preceding exception.

The evidence being closed, the learned judge who presided at the trial delivered a full and able charge to the jury. It embraced all the points arising in the case. We concur with him upon all of them, except one, presently to be considered, and upon that the charge was more favorable to the party defending than he was entitled to claim. The counsel for the claimant submitted ten prayers for instructions; all of which were refused, and he excepted. As the charge of the judge covered the entire case, and is satisfactory to this court, we might, consistently with the rule of law upon the subject, forbear to enter upon their examination in this opinion.* But as some of them involve new and important questions, and all of them have been pressed upon our attention with zeal and ability, and we have considered them with care, we deem it proper briefly to state our conclusions.

The term "*place*," as used in the first section of the act

* Law v. Cross, 1 Black, 533.

of 1863, does not mean any locality more limited than the *country* where the goods are bought or manufactured. The standard to be applied is their value in the principal markets of that country. The commerce into which they enter is international, and the language of the statute must be construed in a large and liberal spirit. Proof of the value of the wines at Paris, if there was no other evidence upon the subject, was sufficient to enable the jury to arrive at the proper conclusion. Upon this point our opinion differs from that of the learned judge who tried the cause.

It is argued that the rule relating to *probable cause*, and the *onus probandi*, prescribed in the seventy-first section of the act of 1799, is confined to prosecutions under that act, and has no application to those under the act of 1863, which is silent upon the subject.

It would be a singular result if, in a prosecution upon an information containing counts upon this and later statutes *in pari materiâ*, the rule should apply to a part of the counts and not to others. The seventieth and seventy-first sections must be construed together. They both look to future and further legislation. In all the changes which the revenue laws have undergone neither has been repealed. The authority to seize out of the district of the seizing officer, and this rule of *onus probandi* have always been regarded as permanent features of the revenue system of the country. This act is the only one ever passed containing this rule. All the later laws are silent upon the subject. In *Wood* v. *United States*,* the court below instructed the jury that the rule applied in a trial upon an information founded upon the acts of 1799 and the act of July 14, 1832. No discrimination was made between the counts. This court sustained the instruction. In *Taylor* v. *United States*,† in *Clifton* v. *United States*,‡ and in *Buckley* v. *United States*,§ the informations were founded upon certain sections of the acts of 1799, 1830, and 1832. The court below applied the rule alike to all the counts.

* 16 Peters, 342, 360.
† 8 Howard, 197, 208.
‡ 4 Howard, 242.
§ 4 Id. 252, 257, 260.

The same result followed in this court as in the case of *Wood* v. *United States*. In none of these cases was the point here under consideration *expressly* made. The applicability of the rule alike in cases arising under *all the revenue laws* was assumed by the eminent counsel concerned and by the court. Other questions relating to the subject were fully discussed. This tacit recognition is equivalent to an express declaration.

The term *knowingly*, in the act of 1863, in the connection here under consideration, refers to the guilty knowledge of the owner, consignee, or agent, by whom the entry is made, or attempted to be made. The offence to be punished consists of three particulars: (1.) The making, or attempting to make, an entry by the owner, consignee, or agent. (2.) The use by such owner, consignee, or agent, of the forbidden means. (3.) Guilty knowledge on the part of such owner, consignee, or agent. This, we think, is the proper construction.

It is asserted, as a consequence, that if the owner is guilty, and the entry is made by an innocent consignee or agent, the case is not embraced by this statute. We cannot yield our assent to this view of the subject. In that case the act of the agent or consignee is to be regarded as the act of the guilty principal, and the same penal consequences follow as if the entry had been made by the owner in his own person.

The court below was pressed to instruct the jury that "*knowingly*" is used in the statute as the synonyme of *fraudulently*. The instruction given was eminently just, and we have nothing to add to it.

The provision that the act should not apply to invoices of goods imported into any port of the United States from beyond Cape Horn, or the Cape of Good Hope, until the 1st of January, 1864, does not affect this case. Its meaning is that the requisites prescribed by this act for foreign invoices, in order to secure the entry of the goods at a port of the United States, need not be complied with in the cases mentioned until the time specified. It does not apply to cases of fraud, and gives no impunity to guilt. If the guilty means

named in the statute were used after it took effect, no matter when they were prepared, the offence was complete. Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects.*

JUDGMENT AFFIRMED.

FENNERSTEIN'S CHAMPAGNE.

In order to show the actual market value of articles of merchandise at a particular place in a foreign country, letters by third parties abroad to other third parties—offering to sell at such rates—if written in ordinary course of the business of the party writing them, and contemporaneously with the transaction which is the subject of the suit—are admissible as evidence, even though neither the writers nor the recipients of the letters are in any way connected with the subject of the suit, and though there is no proof that the writers of the letters are dead.

ON a libel of information and seizure in the District Court for the Northern District of California, the question was whether certain champagne wines made at Rheims, in France, and invoiced for this country in October, 1863, had been knowingly invoiced below "the actual market value of them at the time and place when and where manufactured," at which actual value the statute requires that they should be valued.† Upon the trial, as appeared by the bill of exceptions, the claimants introduced testimony tending

* Taylor v. United States, 3 Howard, 210.

† The reader who desires a full view of the nature and effect of this statute will find it in the preceding case. The present case involved all the questions recited in that, and the additional point presented in the syllabus beside. Of course the latter only is reported.

to show that champagne wines in the hands of the manufacturers in the champagne district of France, in a manufactured state, ready for consumption, have no fixed actual market value, and are not sold or dealt in at the place of production. To rebut this evidence and for the purpose of showing that such wines are held for sale at current rates and prices, at which they are freely offered and sold there, and also to show, among other things, the market value of the wines in question, the United States offered in evidence seven letters, dated on and between October 27, 1863, and May 12, 1864, from various persons, large dealers at Rheims, where, as already said, the wines were manufactured. One will exhibit the type of all:

"RHEIMS, 29th of April, 1864.

"MR. AMOS HILL, OF CALIFORNIA,
Edwards's Hotel, Hanover Square, London.

"I received the letter which you have done me the honor to write to me, under date of Liverpool, 26th instant, and I hasten to answer it. I sell only one single quality of champagne wine, '*Qualité Superieure*,' Eugene Cliquot's brand. The price of this wine is four francs the bottle, and four and a quarter francs the two half-bottles, taken at Rheims, packing included; and I allow 3 per cent. discount for payment in cash. I know perfectly well the kinds of wine which suit the American taste. My brand is also very highly appreciated in New York and California. I have put the price at the lowest that I can sell wine, in consideration of the importance of your orders, and in the hope of establishing permanent relations with your respectable house.

"Accept, Monsieur, my hearty salutations.

"EUGENE CLIQUOT."

To the introduction of these letters the claimant's counsel objected, assigning the same grounds which were assigned against the introduction of certain Prices-Current in the preceding case of *Cliquot's Champagne*, to wit: because they were immaterial and irrelevant; because they referred to champagne wines different in kind, quality, and price from those proceeded against in this action; because no actual sale or purchase had been or was proposed to be proved,

based upon or connected with the letters offered; assigning also as ground additional that these letters were *res inter alios acta*, and that the letters in reply to which they were written were not produced.

The court below admitted the letters, and the government had judgment. On error here their admissibility was the point discussed.

Mr. D. B. Eaton, for the claimant: The theory of the law of evidence, on which these letters were received, would seem to have been this: that when the question is, whether there is a market price for an article, and what the same is at a specific time and in a given city, in a foreign country, the facts relative thereto may be proved by reading in evidence whatever any manufacturer of the article referred to has written on the subject at any time, within about a year of the date in question, to anybody else in any part of the world; and that this may be done when all the letters to which those read are responses, are withheld; when, for aught that appears, *those* letters were mere *decoys*, written to bring back a particular reply to be used in evidence; when no account is given of the persons to whom the letters offered in evidence purport to be addressed and when the name (Mr. Amos Hill, in this one case), may be a *pseudonyme* merely. Is this court ready to declare, in solemn decision, such a theory of evidence, a true one?

Independently of all the objections which in the case of *Cliquot's Champagne* were made to certain Prices-Current there offered, and which apply as well to these letters, the objection of *res inter alios acta* has direct and the strongest bearing.

Mr. Speed, A. G., and Mr. Lake, D. A. for California, contra

Mr. Justice SWAYNE delivered the opinion of the court

The only point of the several objections taken to the admission of the letters necessary to be considered is, that they were *res inter alios acta*, and hence incompetent. The others are disposed of by what was said in the preceding case.

In *Taylor et al.* v. *United States*,* foreign invoices relating to goods other than those of the claimant, and received by other merchants, were admitted to rebut the evidence given by the claimant of a general usage to allow a deduction of five per cent. for measurement—those invoices showing no such allowance—and a foreign letter attached to one of the invoices, though objected to, was also received. This court approved the ruling of the court below. In the case of *Cliquot's Champagne*, just decided, we held that the answer of a dealer, and a Price-Current, relative to the prices of his wines, given by him to a witness, were competent evidence.

In *Doe* d. *Patteshall* v. *Turford*,† it was held by the King's Bench, that the entry by an attorney of the service on a tenant of a notice to quit, made in the ordinary course of his business, was admissible. In *Stapylton* v. *Clough*‡ a like entry made by an attorney's clerk, contemporaneously with the service, was held to be admissible for the same reasons; but the after parol declaration of the clerk, offered to contradict the entry, was rejected. In this case Lord Campbell said, "I entirely approve of the decision in *Doe* d. *Patteshall* v. *Turford*, and the cases decided upon the same principle. They lead to the admission of sincere evidence, and aid in the investigation of truth."

In *Carrol* v. *Tyler*,§ in *Sherman* v. *Crosby*,‖ and in *Shearman* v. *Akens*¶—cases in Maryland, New York, and Massachusetts—the receipts of third persons for money paid to them by one of the parties to the suit were received in evidence without the presence of the persons by whom the receipts were given. In *Holladay, Executor of Littlepage*, v. *Littlepage*,** in the Supreme Court of Appeals in Virginia, the parol declaration by a third person of such payment was admitted. In *Alston* v. *Taylor*,†† in North Carolina, a receipt given by an attorney of another State for certain claims placed in his hands for collection was held to be admissible, to show the

* 3 Howard, 210.
† 3 Barnwell & Adolphus, 890.
‡ 22 English Law and Equity, 276.
§ 2 Harris & Gill, 56.
‖ 11 Johnson, 70.
¶ 4 Pickering, 288.
** 2 Mumford, 816.
†† 1 Haywood, 395, note.

Wayne, Clifford, and Davis, JJ., dissenting.

time at which he received the claims. In *Prather* v. *Johnson*,* the Court of Appeals of Maryland said: "If A., as surety of B., pays a debt due to C., on proof of the payment, A. could recover of B. He could recover on C.'s *saying* he had paid, and of course if C. *wrote* that A. had paid, surely it is evidence whether the writing is *in a book* or *a letter*."

We think the letters in question in this case were properly admitted. In reaching this conclusion we do not go beyond the verge of the authorities to which we have referred. In some of those cases the person asserted to be necessary as a witness was dead. But that can make no difference in the result.† The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business. In most cases he must make the entry contemporaneously with the occurrence to which it relates.‡ In all he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath. The rule is as firmly fixed as the more general rule to which it is an exception. Modern legislation has largely and wisely liberalized the law of evidence.

We feel no disposition to contract the just operation of the rule here under consideration.

JUDGMENT AFFIRMED.

Justices WAYNE, CLIFFORD, and DAVIS declared their inability to assent to so much of the preceding opinion as decides that the letters, written by third persons and addressed to third persons, were properly admitted in evidence.

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* 3 Harris & Johnson, 487.

† 1 Greenleaf on Evidence, § 120; Holladay v. Littlepage, 2 Mumford, 321.

‡ Stapylton v. Clough, 22 E. L. & E. 276.

WALKER v. THE TRANSPORTATION COMPANY.

1. The first section of the act of Congress of March 3, 1851, entitled "An act to limit the liability of ship-owners and for other purposes," exempts the owners of vessels in cases of loss by fire from liability for the negligence of their officers or agents, in which the owners have not directly participated.
2. The proviso to that act allowing parties to make their own contracts in regard to the liabilities of the owners, refers to express contracts.
3. A local custom that ship-owners shall be liable in such cases for the negligence of their agents, is not a good custom; being directly opposed to the statute.

"AN act to *limit the liability* of ship-*owners* and for other purposes," passed by Congress March 3, 1851,* enacts by its *first* section that no *owner or owners*, of any ship or vessel, shall be liable to answer for any loss or damage which may happen by reason or means of *fire* on board said ship or vessel, "unless such fire is caused by the *design or neglect of such owner or owners.*" The same section contains a *proviso* that "nothing in the act shall prevent the *parties* from making such *contract as they please*, *extending* or limiting the liability of such *owner.*" And the *sixth* section enacts that "nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled against the *master*, *officers*, or *mariners* of such vessel for negligence, fraud, or other malversation." Another, that the act shall not apply to the owners of vessels engaged in "*inland* navigation."

With this act in force, Walker & Co. shipped, at Chicago, a cargo of grain on a vessel belonging to the Western Transportation Company, common carriers upon our *northern lakes*, to be delivered at Buffalo. The vessel caught fire, and the grain was burnt up. Walker & Co. accordingly filed a libel *in personam* against the company in the District Court for Northern Illinois for the value of the wheat.

The company, admitting the receipt of the wheat on board the vessel and the failure to deliver, set up three defences:

* 9 Stat. at Large, 635.

1. That the wheat was destroyed by fire, which was not caused by the "design or neglect" of the defendant. This article of the defence being obviously framed so as to profit by the act of 1851.

2. That the wheat was received on board, with reference to the terms of the bills of lading usually given by the respondent, which contained an exception of the dangers of navigation, fire, and collision.

3. That the wheat was received on board with the understanding that the usual bill of lading, common in that trade, should be given and accepted as the contract between the parties; and the article averred that such bill of lading contained a clause exempting the ship-owner from liability for loss by "perils of navigation, perils of the sea, and other equivalent words;" and that by usage and custom, those words included loss by fire, unless the fire had been caused by the negligence or misconduct of the owner or his servants or agents. It then averred that the fire did not occur through the negligence or misconduct of the respondent, or its servants or agents.

All three of the defences were excepted to in the District Court in 1856; and the case being submitted there without argument, the libel, without any rulings having been made on the exceptions, was dismissed.

In 1860 this court, in *Moore and others* v. *The American Transportation Co.*,* decided that, notwithstanding "inland navigation" was excepted in it, the act of 1851 applied to vessels navigating our northern lakes. The libellants, *then* perceiving the advantage to be gained in the face of the act by the admission impliedly made on the other side that the cargo had been shipped and received with an understanding that if fire occurred through the negligence of the owner's *servants or agents* the owner should be liable, *amended* their libel, admitting in form that such was the understanding and contract on both sides; meaning, now, of course, to place their case—as they did afterwards—on the fact that

* 24 Howard, 1

the fire *had* been caused by the negligence or misconduct of the owner's *servants or agents.*

The case was then heard in the Circuit Court, on new testimony taken by both sides as to such negligence and misconduct. No proof however was given in either court as to the alleged understanding, custom, or contract; and this rested on the allegation of the answer and the admission of the amended answer made in the way already stated.

The Circuit Court affirmed the decree of the District Court, dismissing the libel, and the case being now here on appeal, two questions were considered:

1. Whether the owner of a vessel used in the trade on the lakes is liable, independently of contract, for a loss by fire, which occurs without any design or neglect of the owner; although it may be traced to negligence of some of the officers or agents having charge of the vessel?

2. Whether the special contract set up by the respondent, although admitted by the libellants, was founded on a custom which the law would support, and whether or not, therefore, the case was to be governed by the act of 1851?

Mr. Rae, for the appellants; Mr. Spalding, contra.

Mr. Justice MILLER delivered the opinion of the court.

1. The answer to the first of the two questions above presented, and which we have to consider, depends upon the construction to be given to the act of Congress. That the owners of vessels were liable at common law in the case stated in the question, had been decided by this court in the case of the *New Jersey Steam Navigation Co.* v. *The Merchants' Bank.** That decision led to the enactment of the statute. The statute has been the subject of consideration in this court before, in the case of *Moore and others* v. *The American Transportation Co.* The policy of the act, its relation to the act of 53 George III, and other British statutes, are there discussed; and it is decided—that being the principal question before the court—that the act embraces vessels engaged

* 6 Howard, 344.

in commerce on the great northern lakes as well as on the ocean. It is quite evident that the statute intended to modify the ship-owner's common-law liability for everything but the act of God and the king's enemies. We think that it goes so far as to relieve the ship-owner from liability for loss by fire, to which he has not contributed either by his own design or neglect.

By the language of the first section the owners are released from liability for loss by fire in all cases not coming within the exception there made. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect.

When we consider that the object of the act is to limit the liability of *owners* of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners.

If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the sixth section, which, in terms, saves the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

We are, therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally.

2. But there is a proviso to the first section of the act, which says, "that nothing in this act contained shall prevent the parties from making such contract as they please, ex-

tending or limiting the liability of such owner." It is asserted by the libellants that the answer of the defendant sets out a contract which makes the owners liable in case of loss by fire from the negligence of their officers and agents; and that, by the amendment to the libel, this contract is admitted; and that the only question left in the case is the existence of such negligence; a question on which testimony was taken on both sides.

The respondent undoubtedly does set out, in one article of his answer, that the wheat was received on board with the understanding that the usual bill of lading, common in that trade, should be given and accepted as the contract between the parties, and avers that such bill of lading contained a clause exempting the ship-owner from liability for loss by "perils of navigation, perils of the sea, and other equivalent words;" and that by usage and custom, those words included loss by fire, unless said fire had been caused by the negligence or misconduct of the owner or his servants or agents.

This article was excepted to, as well as the other two defences we have mentioned, by libellants in the District Court, when the case was tried there; but no ruling seems to have been had on the exceptions. When the case came to the Circuit Court, after the case of *Moore* v. *The Transportation Co.* had decided that the act of 1851 was applicable to the lake trade, the libellants, perceiving the advantage to be gained by such a special contract, amended their libel and admitted it.

No proof was offered of the contract or of the custom; and it may be doubted if the defendant intended to state, as an affirmative proposition, that on such bills of lading as those described, usage held the owners responsible for the negligence of their officers in cases of fire. But the custom is so stated, and the libellants admit the contract and the construction given to it by custom.

It is obvious, however, that there is nothing in the *language* of such bills of lading concerning "perils of navigation and perils of the sea," which makes the owner liable for the negligence of his servants in case of loss by fire. Can usage add

to words which do not express it a liability from which the act of Congress declares the ship-owner to be free? It was the common law, or immemorial usage, which made him liable before the statute. That relieved him from the force of that usage or law. It cannot be that the liability can be revived by merely attaching such usage to words in a contract which have no such meaning of themselves. The contract mentioned in the proviso, which can take a case out of the statute, is one made by the parties, not by custom; in other words, an express contract.

We do not believe, then, that the special contract set up by respondent, founded on usage, although admitted by the libellants, is founded on a custom which the law will support, and therefore the case must be governed by the act of 1851.

The construction which we have already given to that act requires that the judgment of the Circuit Court, dismissing the libel, shall be

AFFIRMED WITH COSTS.

THE THOMPSON.

1. Prize courts properly deny damages or costs where there has been "probable cause" for seizure.
2. Probable cause exists where there are circumstances sufficient to warrant suspicion, even though not sufficient to warrant condemnation.
3. These principles applied to a case before the court where a captured vessel was restored, but without costs or damages.

THE brig "Thompson," on her return voyage to Halifax from Nassau, was captured at sea with a cargo of 486 casks of turpentine and 81 bales of cotton, on the 16th of June, 1863, by the government steamer, the United States, and sent into the port of New York for adjudication. The capture was made on suspicion that the vessel had broken the blockade of our Southern coast, established by our govern-

ment during the rebellion, or had on board a cargo brought from a blockaded port, and transferred to her under circumstances justifying condemnation. One Clements, of Nova Scotia, in behalf of himself and of a certain Martin & Co., of Nassau, all parties being British subjects, put in a claim for the cargo; another British subject claiming as owner the vessel.

In favor of the claimants were the facts that the vessel when hailed had surrendered without opposition and submitted freely to search; that her papers were unspoiled, regular, and apparently fair; that the master and ship's company were British subjects, without any interest in either the vessel or cargo; that, so far as the face of things showed, the voyage commenced at Halifax and was to have ended there; that the vessel made no port between Halifax and Nassau on her outward voyage, nor any between the same places on her return, and that she was not near any port when captured; neither were any proofs given that the cargo was procured from a blockaded port by any person or persons on board of or interested in the prize vessel, or that it was the property of such person.

On the other hand was the fact well known that, during the rebellion, the subjects of Great Britain, actively engaged in attempts to break our blockade, made the British island of Nassau an *entrepôt*, thus dividing their operations into two parts; first running vessels from the blockaded port to this "neutral" island, and then transhipping their cargoes at it to other vessels, on which they were carried *as if* on a new voyage to some other, the originally real port of destination; and so *vice versa*.

In the specific case before the court it was shown that a schooner, named the Argyle, from Wilmington, North Carolina, with a valuable cargo of cotton and spirits of turpentine, having escaped the vigilance of our fleet, had reached the harbor of Nassau; that she did not discharge her cargo at the wharf, but hauled alongside the Thompson, which was at anchor, and that she transferred enough of her cargo to the latter vessel to load it. "I was told," said the cook of

the Thompson, one witness who proved these facts, "that the captain of the Argyle owned part of the vessel. He was a Southern man, from Wilmington."

In addition to this it was obvious that Martin & Co., claimants of the cargo, were more or less in sympathy with the rebel cause and with the interests of blockade runners. They write to their correspondents at New York and Halifax as follows:

NASSAU, N. P., June 5, 1863.

MESSRS. WIER & Co., HALIFAX, N. S.

DEAR SIRS: We are in receipt of yours of 8th May; contents noted; your craft has not yet arrived. Will care for her when she does.

We have sent by this brig a cargo consisting of 486 casks spirits of turpentine and 81 bales of cotton. We desire it disposed of most to our advantage, either by shipping to England or America, as may appear. We shall write Messrs. Dollner, Potter & Co., of New York, immediately on arrival of the brig. You will telegraph to them and request their instructions. *We are happy to announce the arrival of the schooner Argyle with a full and valuable cargo, about* $42,000. The old thing is about being used up, her bottom being badly wormed. You will, of course, upon consultation with Captain Clements, and Dollner, Potter & Co., if they so decide it most to the interests of all concerned, sell at Halifax. *We do not like to have our property shipped on our account to the United States.* Captain Clements is the owner of one-half the cargo, being that brought out by "Argyle."

We are largely into steamers; one leaves about the 10th for Dixie with valuable cargo; will bring back 1200 bales cotton. Don't you want to invest three to five dollars in a good company. One company's stock is already worth 1200 per cent. in cost in gold.

We are doing quite well. Write often.

Yours, respectfully,

MARTIN & Co.

NASSAU, N. P., June 5, 1863.

MESSRS. DOLLNER, POTTER & Co., NEW YORK.

DEAR SIRS: We inclose herewith invoice and bill of lading of cargo on board brig "Thompson," consigned to Messrs. B. Wier

& Co. We have instructed them to confer with you in regard to its disposition, as under our present situation we cannot ship our stuff to you direct. You will order it wherever you may, on consultation with them, agree is most to our interests. We have instructed them of this fact. The cargo is jointly owned by the owners of the A 1 boat.

We are happy to tell you the famous boat arrived ten days ago with 460 *casks spirits,* 90 *bales cotton, and* 50 *to* 60 *barrels No.* 2 *rosin in bulk, which we shall send to you as soon as a chance offers. We've also* 28 *bales on hand.* We will write you by steamer at once so as to go on Monday.

Yours truly,

MARTIN & Co.

The District Court for New York, where the libel was filed, considering that there was sufficient cause to bring the vessel and cargo in for adjudication, but not enough to condemn them, restored them both, but restored them *without damages or costs.* From this last part of the decree the claimants, who insisted on recompense in damages, severally appealed.

Mr. Donohue, in their behalf.

1. *As to the vessel.* No cause whatever existed, either at the time of seizure or trial, for her capture. All her papers were regular and fair; she was bound on a legitimate voyage, and in its due prosecution. Being a neutral, owing to us no allegiance, and taken on the high seas, she is entitled to recompense for her damages.

2. *As to the cargo.* It is clear that this cargo, if proved to have run the blockade, had reached the territory of a foreign nation, the home of one of the claimants, and was within his power in such neutral country. The mere fact of so having run the blockade, no more subjects it to forfeiture than does the same fact subject most of the cotton to be found on the high seas between Havana, Matamoras, Nassau, and European or American ports. Almost all such cotton has been run out from blockaded ports. In fact, every day shows the

arrival and entry of such cotton in our own ports. Blockade-running is not a crime. It is but an enterprise attended with peril. Neutrals have rights quite as good as belligerents. Because two nations have got into a quarrel—an absurd or wicked one perhaps—a third nation, which did nothing to bring it on, and cares nothing, perhaps, about it, except that it shall come to a conclusion, is not to have her commerce ruined. The restriction upon the rights of third parties must not be made *too* oppressive.

8. *As to both vessel and cargo.* By the nature of prize evidence, the claimant has but little means of proving bad faith, or showing bad faith in the captors; but, in this case, we submit that the seizure was a speculation, proving an intent to make the appearance of official duty cover an ulterior and interested motive. Extraordinary conduct, in such cases, is liable to severe censure.* When dealing with foreign nations, a frank and generous system is to be established. Foreigners will thus understand, as they have understood, that while we can and will protect and enforce our rights, we are not disposed to cover speculative efforts to get prize-money.

Finally. No amount of good intention or good faith can excuse a damage to a neutral, if the captor is mistaken in law as to his rights, and he has the means before him to ascertain the facts. In the Acteon,† where the vessel was in good faith, but without right destroyed, the court says:

"There are circumstances that may have afforded very good reason for destroying the vessel, and made it a meritorious act in Captain Capel, as far as his own judgment is concerned; but these furnish no reason why the American owner should suffer. It does not appear that Captain Capel is charged with having acted with corrupt or malicious motives. If, as I believe to have been the case, he has acted from a sense of duty and of obedience to orders, I can have no doubt that he will be indemnified. I must pronounce for costs and damages, and this without imputation in the conduct of the captain." "If the

* Le Louis, 2 Dodson, 240.

† 2 Dodson, 51, 52.

captor has acted from error and mistaken duty, the suffering party is still entitled to full compensation (if not contributing to the loss)."

In *The John*,* the court says:

"Most certainly it is not sufficient for a party to plead ignorance as a legal excuse for making compensation to another, if his ignorance was vincible to himself at the time at which the transaction took place. In an unfortunate case like the present, the court would certainly be disposed to give the captain all possible relief; but I need not add, that no relief is possible which cannot be given consistently with the justice due the claimant—that is the true rule."

We respectfully submit, then, that, on well-settled principles, on evidence here, the court was wrong in withholding costs and damages from us, and the decree, in that respect, should be reversed.

Mr. Coffey, special counsel of the United States, contra. The evidence shows not that the court below leaned too much in favor of the captors, but that it went too far in favor of the claimants. It shows that the cargo of the Thompson consisted certainly in part, and probably in whole, of the cargo which had broken the blockade of the port of Wilmington on the Argyle; that it was transhipped from the Argyle to the Thompson, without any landing whatever at Nassau; that no change of ownership or possession of the cargo took place at Nassau; that it never entered into the commerce or became part of the common stock of Nassau, and that its transfer to the Thompson for carriage to Halifax was part of the commercial venture which had its origin in Wilmington, and would have had its end at Halifax. The cargo brought from Wilmington to Nassau on the Argyle had *no commercial destination* to Nassau, and that port can in no just commercial sense be called the end of its voyage from Wilmington. It was simply an intermediate port for transhipment on the way from Wilmington to Halifax.

* 2 Dodson, 51, 339.

The evidence discloses, moreover, the existence of an organization of blockade-breakers, represented at Nassau by Martin & Co.; at Halifax, by B. Wier & Co.; at New York, by Dollner, Potter & Co., and of which Clements, one of the claimants, is also an active partner. Adopting the familiar devices by which blockade-breakers sought to lessen the risks of their business, they divided their operations into two parts; first, running vessels from the blockaded port to Nassau, and, secondly, transhipping their cargoes at Nassau to other vessels, on which they were transported, as if on a new voyage, to Halifax, or some other port of real destination. The cargoes thus run out were to be sold at the port of real destination, "upon consultation" of the parties interested, as they should "decide it most to the interests of all concerned." Of the vessels employed in this business, the Argyle is a sample of one class, and the Thompson of the other. They were as much parts of one commercial venture, common agents in a single voyage, beginning at Wilmington, and ending at Halifax, as are two locomotives which draw a train of cars over separate parts of the same railroad.

This cargo was shipped at Wilmington, with the intention of being at Nassau transhipped for further transportation to its market, *with unchanged ownership and control.* This *intention* in the original shipment furnishes the test by which a prize court will determine the *status* of the cargo when captured, if the cargo be taken on the voyage, prosecuted in execution of that intention.

There was thus sufficient ground even for condemnation. That both vessel and cargo were not condemned is evidence that the rights of neutrals are respected by our courts with sensitive regard.

But if the facts would not have justified condemnation, beyond question they justified the refusal of costs and damages. For they amount to proof of probable cause of capture; and this is the test by which, in doubtful cases, prize courts determine whether costs and damages ought to be

allowed or refused, and the question is one purely in the discretion of the court.

Mr. Justice DAVIS delivered the opinion of the court.

The District Courts of the United States have original exclusive jurisdiction in questions of prize, and are authorized to decree restitution in whole or in part when the capture is wrongful; and if it is made without *probable cause*, may order and decree damages and costs against the captors.*

In time of war, the party who makes a seizure does not always act at his peril, and is not always liable to damages and costs if he fails to establish the forfeiture of the vessel. In fact, prize courts deny damages in case of restitution when there was probable cause for the seizure, and are often justified in awarding to the captors their costs and expenses.†

The question recurs, what, in the sense of the prize law, is meant by the terms "*probable cause.*" Chief Justice Marshall, in *Locke* v. *United States*,‡ held that the terms "probable cause," according to their usual acceptation, meant less than evidence which would justify condemnation, and in all cases of seizure had a fixed and well-known meaning; that they import a seizure made under circumstances which warrant suspicion. The court in that case were construing the 71st section of the collection law of 1799, which provided that the *onus probandi* should be on the claimant only where probable cause was shown for the prosecution. It was contended, that in order to justify seizure, the evidence must be such as, if unanswered, would justify condemnation. But the court held that such a construction would render totally inoperative the provision of the act of Congress. Judge Story, in *The George*,§ which was a libel for damages for an alleged illegal capture, gave the same exposition of the terms "probable cause" in matters of prize, and held that the capture of a ship was justifiable where the circumstances were

* Glass v. The Sloop Betsy, 3 Dallas, 16; Act of June 26, 1812, § 6; 2 Stat. at Large, 161.

† The Apollon, 9 Wheaton 372.

‡ 7 Cranch, 339.

§ 1 Mason, 24.

such as would warrant a reasonable ground of suspicion that she was engaged in an illegal traffic. And such is the view held by all writers on maritime warfare and prize.* To adopt a harsher rule, and hold that the captors must decide for themselves the merits of each case, would involve perils which few would be willing to encounter.

Testing this case by these principles, was the District Court justified in decreeing restitution without costs and damages against the captors?

Does not the fact that the schooner Argyle did not discharge her cargo at Nassau, but hauled alongside of the Thompson, then at anchor, and transferred enough of her cargo to load the latter vessel, afford a reasonable ground of suspicion that there was concert between the vessels, and that the Thompson was purposely at Nassau to receive the cargo of the Argyle? And if further evidence was wanted to fix the character of the transaction, it is furnished in the letters of Martin & Co., who claim, in conjunction with Captain Clements, the ownership of the cargo, to Wier & Co., of Halifax, and Dollner, Potter & Co., of New York. These letters are written in a strain of high exultation. The Argyle has arrived with a cargo worth $42,000, in which Clements is interested, and Martin & Co. are sending steamers to Southern ports for return cargoes of cotton, in which ventures they want the participation of Wier & Co. "The famous boat" with cotton, rosin, and casks of spirit has also reached port, and would be sent forward as soon as an opportunity offered. And, withal, Martin & Co., as if fearing evil, dread to have their property shipped on their account to the United States. Could any foreign merchant interested in lawful commerce wish to avoid the markets of this country?

It is too plain for controversy, that all these parties were extensively engaged in illegal traffic with the States in rebellion, and that the business was profitable. And the whole evidence tends strongly to show that the voyage from Wil-

* Story's Notes, by Pratt; The St. Antonius, 1 Acton, 113.

mington to Halifax was a continuous one; that there was no intention to terminate it at Nassau, and that the cargo of the Argyle was to be reshipped with unbroken ownership and control, so that it could be taken to a port which furnished a better market. If such was the intention, when the cargo left Wilmington, then its status is fixed, and the original guilt continued to the time of the capture, notwithstanding the stoppage at an intermediate port, and transhipment.*

A case of "probable cause" is clearly made out, and it is unnecessary to discuss the evidence with a view of showing whether the cargo or vessel should have been condemned, as the captors do not complain of the judgment of the court below.

The District Court committed no error in refusing to give the claimants damages and costs, as against the United States, or the captors.

DECREE AFFIRMED WITH COSTS.

THE LOUISIANA.

1. A vessel drifting from her moorings and striking against another vessel aground on a bar out of the channel or course of navigation will be liable for damage done to the vessel aground, unless the drifting vessel can show affirmatively that the drifting was the result of inevitable accident, or of a *vis major*, which human skill and precaution could not have prevented.
2. The fact that a vessel on arriving at a wharf is moored in a way which, in reference to the state of the tide and wind at that time, is proper, and that in *this* position she is made as fast as she can be, is not an excuse for her breaking away on a change of tide and wind, if ordinary nautical skill would have suggested that such a change would produce different and reversed conditions of risk.

DURING the Southern rebellion, the Louisiana, a large

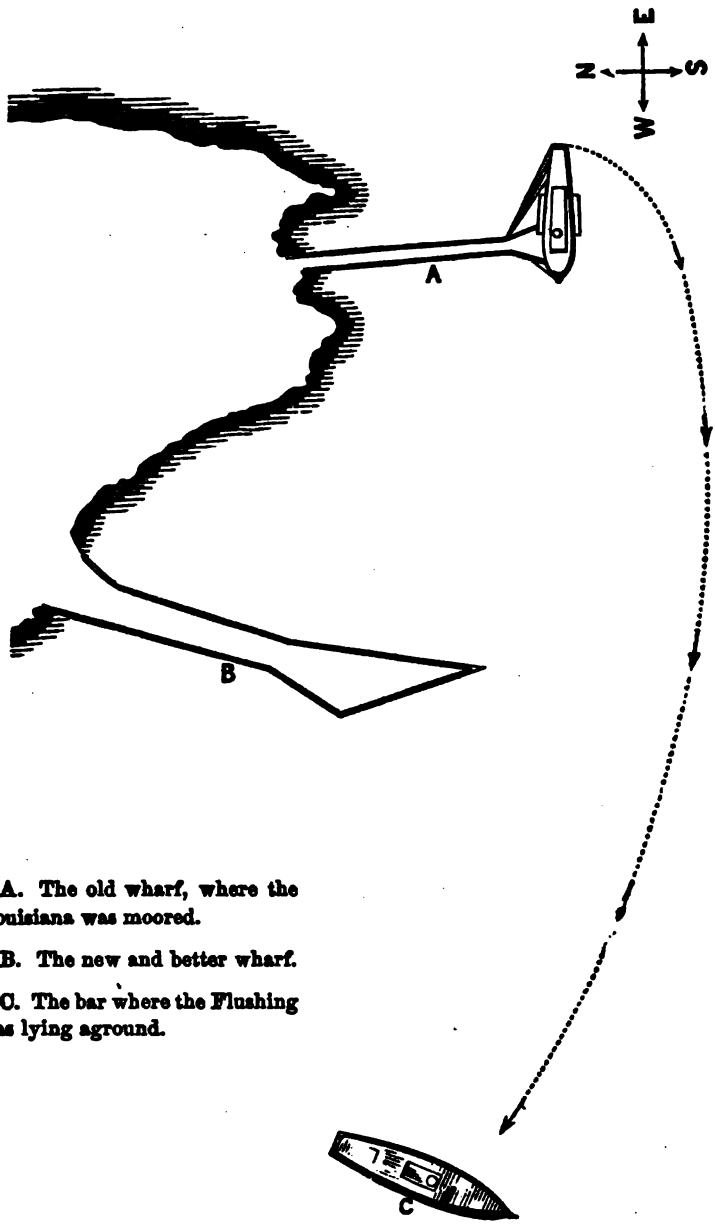
* The Thomyris, Edwards, 17; The Maria, 5 Robinson, 365; The Maria, 6 Id. 201; The Charlotte Sophia, Id. 204, note; The William, 5 Id. 385.

steamer, loaded with sick and wounded soldiers from our army in the South, and bound for Philadelphia, stopped at Fortress Monroe; her purpose in going there having been the twofold one of landing certain of the soldiers who were too sick to proceed on their course, and of taking in supplies of coal. At this time, on a place in Hampton Roads known as Hampton Bar, was a steamer (C) called the Flushing, lying aground. (See map at p. 167.) She had been there seventy-two days, unsuccessful efforts only having been made by her owners to float her. The spot where the vessel lay was one that had been selected for the location of a buoy to mark the bar and warn vessels off, and the Flushing had gone aground because the buoy had been carried away. Having lain in this place one hundred and thirty-three days she was finally abandoned by her owners, and was then raised by the wreck-masters. Under orders of the government, in whose service she was, the Louisiana proceeded to a wharf (A), called the old wharf; there being a little below another and much better one (B), called the new one. This old wharf was a narrow projecting pier, having at its extremity toward the roads a widening; the whole being somewhat in the shape of a T; but even at its front the wharf was but eighty-two feet wide. The steamer laid and fastened herself in the only way in which vessels could lay and fasten themselves to this wharf; that is to say, along its front. The Louisiana being, however, a long vessel, two hundred and seventy-five feet long, a small part of her, less in fact than one-third, was capable of being placed in juxtaposition to the wharf. Moreover, as soldiers were to be landed and coal taken in at the same time, it was apparently necessary to have two gangways in operation at once; and, as the after-gangway could not be used in consequence of the narrowness of the front of the wharf, both gangways were rigged forward. *This threw the stern part of the boat nearly one hundred and fifty feet distant from the nearest point of the wharf.* In addition, owing to the extent to which the wharf ran out into the sea, it was not practicable to fasten the vessel by lines, which should run from her *extremities* and at *right angles* to them to the *shore*.

All that could be done was to fasten her towards her bow (where she lay in juxtaposition to the wharf) by lines running at right angles from her to posts, &c., on the wharf; while from the extremities, and more especially the stern, lines ran to fastenings on the wharf also. These stern-lines, running transversely, operated of course much more to steady the boat than actually to hold her. The diagram, in which from necessity the top of the page is made to represent the east, will elucidate the matter.

In the morning, when the Louisiana arrived at the old wharf, the tide was ebb; that is to say, was coming *from* the west; swinging round the land somewhat to the northeast. On the other hand, the wind, at this time quite gentle, was from the northeast. Tide and wind, in their action on the boat's fastenings, thus counteracted each other. The vessel was placed with her bow against the tide; that is to say, to the west. She put out three lines, one at the stern and two forward; these being sufficient at this time to hold her. Later in the day the tide changed from ebb to flood; that is, it ran west, or somewhat round the land from the northeast, and the wind rose; coming still from the northeast; tide and wind now acting of course in one direction. Shortly before this time the captain, who was about to leave the boat to go and see the surgeons of the fort in regard to the sick and wounded soldiers on his steamer, gave the boat into the mate's charge. He and the two mates conversed, however, previously on the subject of the fastenings. They "did not anticipate the breaking away of the vessel, and thought the lines sufficient to hold her;" though the captain told the first mate that if he thought it necessary he could put more fastenings still. With the change of tide and the rising of the wind new ropes were accordingly put out by the mate. Five ropes now ran out front and four aft; the "bights" of these last going over the same posts. The ropes were seven and nine inch ropes, and all were new. No more ropes in fact could be applied forward than were applied. The cleets being all employed, the capstan was used besides. By degrees the wind increased and became high. It came "*in*

Statement of the case.



A. The old wharf, where the Louisiana was moored.

B. The new and better wharf.

C. The bar where the Flushing was lying aground.

squalls," "*a pretty taut breeze*," "*a little more than ordinary*;" "*blowing fresh*," "*blowing half a gale*." In this gale the vessel—snapping her stern-lines first, and then on being forced round with her broadside to the wind, tearing away at the bow—broke off violently from her fastenings. At the stern, as already said, her *lines* broke; but at the bow the lines were so strong that they did not part. It was only by the cleets and capstan being torn up out of their places and so giving way that the vessel finally at this part got loose. Drifting sideward, to the west, with her bow towards shore, and past the new wharf, the Louisiana came down upon the Flushing, injuring her essentially. The captain and mates considered that "the accident was unavoidable." Other vessels, of which there were several in the neighborhood, kept to their fastenings; nor was there any other collision or accident of any kind in Hampton Roads on that day. The mate, under whose charge the vessel had been after the captain left her, said, on examination, "According to my judgment, the vessel was made sufficiently fast to lay at that wharf." When asked why he did not change the position of the boat to meet the change of tide and wind, he said, "I did not think there was any *necessity* for the change. We *were lying very nice* at the wharf; nor did I think it necessary to do more than I had done."

The distance from the old wharf to where the Flushing lay aground was about 800 feet. Testimony tended to show that if an anchor had been dropped anywhere within the first 400 feet of the distance over which the Louisiana drifted—that is to say anywhere *between* the two wharves, where the water is shallow—it might perhaps or probably have brought her up. No anchor, however, was thrown until she had drifted nearly 700 feet.

The testimony in regard to her manœuvres after she broke loose was not very clear. It was plain that she had drifted against the Flushing; nor did the witnesses agree as to the movements of her machinery. The captain "backed" her machinery, though not at immediately on breaking loose, which if he had *then* done would have cleared the Flushing.

The Circuit Court for Maryland, reversing a decree of the District Court in Admiralty, which had held the Louisiana not in fault, decreed against her for the full damage done, each party to pay his own costs. The case was now here for review.

Mr. Schley, for the owners of the Louisiana, appellants in the suit: The case shows that the owner of the Flushing had been guilty of neglect in suffering her to remain so long on Hampton Bar. She was a public nuisance. It was because she was improperly there at the time, that she was injured by the collision and did injury to the Louisiana. Even then, if the Louisiana was in fault, as the most favorable result for the Flushing, the damages of both should have been blended and divided. But this rule ought not to apply, in a case of public nuisance, especially as against one who did not wilfully commit injury. The owner of the Flushing might have abandoned the wreck, and would thus have escaped responsibility. But, holding possession, responsibility attached. In *Brown* v. *Mallett*,* Maule, J., delivering the judgment of the C. P., said:

"There seems no doubt that it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to other vessels, . . . and the liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it. In all these circumstances the vessel may continue to be in his possession and under his management."

And this view was approved in a later case, in the Exchequer, by Baron Alderson, speaking also for the court:

"The mere fact that one vessel strikes and damages another does not," said the late Chief Justice Taney,† "of itself, make her liable for the injury. The collision must, in some degree, be occasioned by her fault. A ship, pro-

* 5 Manning, Granger & Scott (57 English Common Law), 615.

† Brig James Gray v. Ship John Fraser, 21 Howard, 194.

perly secured, may, by the violence of a storm, be driven from her moorings, and be forced against another vessel, in spite of her efforts to avoid it. Yet she certainly would not be liable for damages, which it was not in her power to prevent." In *The Ligo*,* Sir C. Robinson said: "The law requires that there should be preponderating evidence to fix the loss on the party charged, before the court can adjudge him to make compensation." And in *The Bolina*,† Dr. Lushington decided, that where there is no *primâ facie* evidence of negligence and want of seamanship, the *onus* does not necessarily attach to the party proceeded against, alleging inevitable accident, to prove it; but, on the party, seeking indemnification, to prove that blame attaches to the other party.

The mere fact, therefore, of the Louisiana breaking away from the old wharf is no sufficient evidence of fault.

It will be remembered that soldiers had to be landed and coal to be taken in, at the same time. The vessel was laid at the wharf and rigged in the only way practicable; her stern necessarily projecting far past the wharf. Expedition was a duty. It was a time of war. It is not pretended that sufficient fastenings were not made forward. No more ropes could be passed through the cleets, and therefore the capstan also was used; and to show the sufficiency and strength of the fastenings forward, the facts are shown, that the cables forward did not part; that the cleets gave way, and the capstan was broken. It is clearly proved that when the wind increased and the tide changed, additional lines were put out. The argument, therefore, must rest on the alleged insufficiency of the fastenings from the stern of the boat to the wharf. Now, the case shows that, when the vessel first laid at the wharf, she had three lines out; one at the stern, and two forward. Subsequently, the two forward were increased to five; and the one aft was increased to four; and the bights of those lines went over the same posts, which,

* 2 Haggard, 360.

† 3d Notes of Cases, 208, in 5 English Admiralty Reports, 208.

in effect, doubled the number. There is nothing in the case to show specially that the boat was carried off by any regular action of the reversed tide and increased wind. Against *these* the captain and mate guarded. We infer that it was some one irregular action of the water—something not to have been foreseen as a result even of the changed conditions of tide and wind, which lifted up the stern of the vessel, slackened the stern fastenings, and thus enabled the storm at one special moment to get hold of the boat, and to cause the lines to snap, the wharf to give way, or the vessel to be torn asunder; no matter how strong the lines were. To consider this result as evidence of neglect, would destroy the notion of a special and inevitable accident, and would make the owners responsible not only for the storm, but for those hidden perils of the sea, not to be calculated against.

Will it be said that seamanship required of the captain to change his position at the wharf when the tide changed; that is to say, to liberate the steamer from her fastenings, and to go out into Hampton Roads, and come back to the wharf, and lay her bow to the *eastward*, facing the wind and tide? It is easy to be wise after a catastrophe; easy to avoid perils on which the stern-lights of experience are shining. But the question is, what was obligatory *before* the accident? The fact that the captain and mate of this vessel were appointed by the government to the discharge of a most responsible duty raises a presumption of their general capacity and carefulness. A general competency for their office of seamen must be inferred from it; and indeed is otherwise presumable. Now, as a matter of fact, the captain and mates believed that the vessel, fastened as she was, was safe. They thus thought upon considering the matter and looking at the case with all the evidences of risk before them. It was their conclusion *super materiem subjectam*, after discussion and advisement upon it. It was no fault of theirs that they thus believed; and as matter of fact, we repeat, they did thus believe. Now, suppose, believing as they thus truly did, that the vessel was safe—that the risks of staying still were greatly less than those of any attempt to refund in

a high wind—that they had, nevertheless, cut loose, put out, attempted to reland, and in such attempt had met with some terrible disaster to their sick and wounded charge and cargo, what words, on such a result, would be wanting to express indignation at their rashness and folly? If in the effort to change the position of the steamer, the captain had been caught by a sudden squall, he would have been without excuse. It would then have been said, that he would have done right if he had remained at the wharf, and that if, in remaining there, he had been driven from its moorings, it would have been a case of inevitable accident. The *Juliet Erskine** would have been quoted on him. Dr. Lushington there says: "Where a collision takes place, when every prudent measure, consistent with ordinary seamanship, has been adopted, and carried into effect by the vessel proceeded against," it is a case of inevitable accident. So would the language of Taney, C. J., already cited. The argument *then* would be that the captain had abandoned a sure protection, and had undertaken an unwise and dangerous and improper experiment.

Will it be said that the steamer was not properly managed after she broke loose? Even if this had been the case, great allowance should be made for any seeming errors, if such appeared, and the remarks in *The Genesee Chief*† would apply. In that case the court say: "If in the excitement and alarm of the moment, a different order might have been more fortunate, still, under the special facts, the court will not hold the party who might have given it responsible. He was in a situation where there was no time for thought. If an error had been committed, it would not, under the circumstances have been a fault." But, to those familiar with Hampton Roads, this mate's conduct was, in a high degree, judicious, and his orders precisely such as were necessary. When the steamer broke loose, she was drifting sideways and westward, her bows towards the beach. Unless backed she would have grounded; and, even if she had escaped the

* 6 Notes of Cases (5 English Admiralty Reports, 534).

† 12 Howard, 461.

shoal, she would have come into collision with the vessels at the "new wharf." She was, therefore, properly backed, and escaped both. There was no room to work her, unless her bow could be brought to face the wind and tide, both of which were from the east. He cast an anchor—not for the purpose of riding to the anchor—but to produce the effect of changing the position of the steamer. This was the right manœuvre.

After an excellent argument by *Mr. Bernard Carter, of Baltimore* (his first before this bench), *and Mr. J. M. Campbell, contra,*

Mr. Justice GRIER delivered the opinion of the court.

The steamer Flushing being aground on Hampton Bar, out of the channel or course of vessels navigating the bay or harbor, and incapable of motion, cannot be justly charged with any participation in causing the collision.

The collision being caused by the Louisiana drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a *vis major*, which human skill and precaution, and a proper display of nautical skill could not have prevented.

Now the facts show that the Louisiana has entirely failed to establish her defence.

1. The drifting of this vessel was not caused by any sudden hurricane which nautical experience could not anticipate. None of the other numerous vessels, at that time in the harbor, were driven from their moorings. The wind which arose was only of such a character that its effects might have been anticipated, and, by proper precaution, prevented;—"a half gale," "a stiff breeze," "a little more than ordinary."

The fact that the steamer was ordered by the government officers to take in coal at the old wharf, which had a narrow front when compared with the great length of the vessel, could not relieve the officers of the boat from the duty of securing her in such a manner as to prevent her drifting

when the change of the tide and winds changed the direction of the forces acting upon the vessel. And the fact that under these circumstances she *did* drift, is conclusive evidence that she was not sufficiently and properly secured.

It requires no assumption or affectation of any very great nautical skill in this court to point out the defects of the management of this vessel by the mate, who was left in charge of her. If the tide and wind could have been reasonably expected to remain as it was when, according to the mate's idea, the vessel was lying so "*very nice to the wharf*," we should probably not have heard of this case.

So long as things were in the condition in which they were when the vessel was first moored, she was sufficiently secured to meet any stress or force likely to be opposed to her in that direction. But when the tide changed so as to strike the stern with a momentum increased by a high wind, and multiplied by the leverage resulting from the length of the vessel exposed below the wharf, the "necessity" for a change of position ought to have suggested itself to a person of nautical skill, as a proper precaution against a danger which might justly have been anticipated. The fact that the captain and mate "did not anticipate the breaking away of the vessel, and thought the lines sufficient to hold her," may prove their want of judgment, but not that "the accident was unavoidable;" and this more especially, as other persons of nautical skill—disinterested witnesses in this case—found no difficulty in securing their vessels at the same place, and under similar circumstances.

2. It is not necessary to a decision of the cause to show that this collision might have been averted by a proper use of the anchors of the Louisiana, after she had broken away from her mooring at the wharf, or by a proper use of her steam power, further than to say, that the testimony in the case would well justify that conclusion.

We are of opinion, therefore, that the appellant has failed to show that the collision is the result of inevitable accident, and that the decree of the Circuit Court should be

AFFIRMED WITH COSTS.

Syllabus.

BLACKBURN v. CRAWFORDS.

1. Though on a question of marriage and legitimacy, it is competent, in order to prove an heirship asserted, to give in evidence the declarations of any deceased member of *that* family to which the person from whom the estate descends belonged, yet it is not competent to give the declarations of a person belonging to another family,—such person being connected with the person from whom the estate descends only by an asserted intermarriage of a member of each family.
2. Independently of statute requiring it to be kept, a baptismal register of a church, in which entries of baptism are made in the ordinary course of the clergyman's business, is admissible to prove the *fact* and *date* of baptism, but not to prove other facts, as, *ex. gr.*, that the child was baptized as the *lawful* child of the parents, and hence to infer a marriage between them.
3. By the law of Maryland a finding by a jury—on an issue directed by the Probate Court—that a party who has applied for administration on the estate of one whom he asserts to be his uncle, is illegitimate, and a consequent grant of administration by the court to another party, is conclusive of the illegitimacy *as between these parties*, in an action of ejectment subsequently brought by the party rejected.
4. Where there has been no official registry of marriages kept in the church where a clergyman ministered, a private memorandum, in which the minister, in the ordinary course of his business, has entered or intended to enter, as it occurred, each marriage celebrated by him, is admissible on a question whether such minister ever did or did not celebrate a particular marriage in question.

   But the memorandum ought itself to be produced; and if the testimony of the minister proving the memorandum is taken by commission, the memorandum ought itself to be annexed to the deposition; or—if the deposition is taken in a foreign country and the possessor of the memorandum be unwilling to part with the original—a proved copy.

   However, if neither the original nor such copy has been annexed, the objection to the want of such original or copy should be taken in some form (such as motion to suppress) before the trial. If made first on the trial it is too late. *York Co.* v. *Central Railroad*, 2 (*supra*, p. 107), on this point, affirmed.
5. On a question whether a particular priest of the Roman Church ever celebrated a marriage at a particular church between parties who had been previously living in fornication, his statement that no official registry of marriages was kept, but that he kept a private memorandum for himself (producing and annexing it as above specified), and that the alleged marriage did not appear in it; that he was aware the law imposed a penalty for performing the ceremony without a license;

that he never married parties without a license; that he always required the presence of two witnesses; and that he never celebrated a secret marriage between parties living in sin, one or both of whom would only be married on the condition that such marriage was to be kept secret—is admissible.

6. On a question of marriage and legitimacy, an attorney, who drew a will for the alleged husband now deceased, in which the children of the connection set up as wedlock are described as the "natural children" of the testator, may, without violating professional confidence, testify what was said by the testator about the character of the children and his relations to their mother, in interviews between the testator and himself preceding and connected with the preparation of the will.
7. If parties having had children in concubinage, marry and after the marriage recognize and treat such children as theirs, such children by the laws of Maryland are regarded as legitimate.
8. A marriage in the District of Columbia, if celebrated by a clergyman *in facie ecclesiæ* is not invalid for want of a marriage license.
9. Although parties have lived long together, and a marriage has been sworn to and the circumstances particularly described by one of the parties, and other witnesses have testified to facts indicative of wedlock as distinguished from a concubinate, still a jury may find, on counter evidence, that the cohabitation during the whole term was illicit.
10. In ejectment, where a regular marriage by a clergyman *in facie ecclesiæ* at a specific time and place is set up as evidence of the legitimacy of children suing as heirs-at-law to recover, and all the testimony in the case clusters about and relates to *such* a marriage, it is error to refer it to the jury to consider whether the parents were *at any time* married; and in such a case, unless they find that a marriage was in fact celebrated, they cannot find that the connection was wedlock or that the issue from it is legitimate.
11. It is error to instruct a jury that if a man and woman live together as husband and wife and the man acknowledge the woman as his wife and always treat her as such, and acknowledge and treat the children which she bore him as his children and permit them to be called by his name,—then that the *presumption of law* is in favor of their legitimacy. The question of legitimacy, under such circumstances, is a question for the jury; the law making no presumptions about it.

DR. CRAWFORD, of Prince George's County, Maryland, died *intestate*, in December, 1859, the proprietor of large landed estates there; Greenwood Park, Waring's Grove, Federal Hill, Westphalia, Ranleigh, &c. He left no wife, nor child, nor brother nor sister surviving him. Claimants to such estates, however, were not long wanting. On the one hand were relatives of the name of Blackburn, con-

fessedly his cousins-german; on the other, persons bearing his own respectable Scottish name of Crawford: George Thomas Crawford, Mary Elizabeth Crawford, Sarah Jane Crawford, and Anna Victoria Crawford, the children of a brother, Mr. Thomas B. Crawford, who had died before him. The title of these children—as nephews and nieces, and nearer of course than cousins—was clear, but for a single difficulty; the fact that their *legitimacy* was called in question. It was asserted that their mother had been the mistress not the wife of their father. The intercourse of the parties had, confessedly, in its origin been irregular; but the allegation was that a marriage had subsequently taken place.

The family name of the mother was Elizabeth Taylor. In May, 1860, Mr. Crawford being then dead, she gave under oath in a judicial proceeding her own account of her relations to him. She testified that thirty years before, she herself being then twenty-two years old, she became acquainted with Mr. Crawford; she also knew Dr. Crawford, and became acquainted with him before she knew his brother; she became acquainted with Mr. Crawford while she lived with her mother, on a place rented from Mrs. Magruder. Her intimacy commenced with Mr. Crawford at that place. She and her mother afterwards removed to Monterey (a seat some distance from the city of Washington), owned by Mr. Crawford; where her mother died; she herself and her brother, however, continuing to live there. Her eldest child was born there. The house at Monterey was furnished by Mr. Crawford, and he provided and paid all the servants. Her intercourse with him was not commenced and assented to by her under a promise of marriage. Soon after its commencement he often said he would like to marry her, but owing to his family he could not marry her then. When the child Sarah was about eight months old she went to Washington City to have it christened, and also to visit *her sister, Mrs. Evans*, who was the wife of the sexton of St. Patrick's Church, in that city; the child was christened in the church on Sunday, after eleven-o'clock service. As she

went out the *Rev. Mr. Fiziac*, who had performed the ceremony, and was one of the officiating priests there, followed her and had a long conversation with her about the mode of her life. He told her that the salvation of her soul was of more importance to her than all things else, and that she could not be saved if she continued living in sin with Mr. Crawford. The conversation was a long one, and at his instance she made up her mind, if Mr. Crawford would not marry her, to leave him; Mr. Crawford had sent the carriage up for her to come home; she sent it back on that Sunday evening, with a request that Mr. Crawford would come up the next day. He accordingly came up, and she had a long interview with him; she related to him what Mr. Fiziac had told her, and that the salvation of her soul was of more importance to her than all things else in this world; that she must separate from him if he would not marry her. He replied that he did not know about it, but that he could not marry her unless the marriage was kept secret from his mother and from his brother, Dr. Crawford. She assented that the marriage should be kept secret, and he then consented to marry her; she agreed that the marriage should take place the next day. On the next day, Tuesday, they went to St. Patrick's Church, and were there married by the Rev. Mr. Fiziac; *her sister*, *Mrs. Evans*, and her brother, Samuel Taylor, being present. Both of them were now dead. Mr. Crawford returned home that evening. She remained with her sister until the following Sunday, and then returned home to Monterey in Mr. Crawford's carriage. Mr. Crawford often, after the marriage, objected to his brother, Dr. Crawford, knowing anything about it, for, he said, if he did, that neither he nor his children would ever get a cent of Dr. Crawford's property. Her children, George and Victoria, were born after the marriage; George was born some ten or twelve months after it. From the time of the marriage she and Mr. Crawford lived together as man and wife—about four years and a half before Mr. Crawford's death. He took her and the children to live with him at Greenwood, the place where the Crawford

family had been living; she took charge of the house at Greenwood, and sat at the head of the table; she made purchases for the family, and at the request of Mr. Crawford kept his money. She always kept the marriage secret, and never disclosed it until after the death of Dr. Crawford; she then disclosed it to Mr. Hill, who called upon her and asked her about it; he told her he had heard it rumored, and wanted to know the facts from her; she then, for the first time, told all about it to him. Mr. Crawford was always very kind to her; he sent the children to school, first to Wilson's, and afterwards sent the girls to Washington; the school bills were paid by him through her; he gave her the money to pay them; she also frequently purchased goods for the family in Washington and elsewhere; when she went to Washington she went in Mr. Crawford's carriage, and he occasionally went with her. When she first went to Greenwood, Dr. Crawford came there more frequently than afterwards; she always avoided him when he came, because she knew his dislike to her and the children. Dr. Crawford ceased visiting Greenwood for some time before the death of his brother, and was not there when he died. She was with Mr. Crawford at the time of his last attack; he was first attacked on the front porch at Greenwood; while in the act of stooping to wash he fell; she was close by, in the house, and was the first one to get to him; this was about six o'clock in the morning; he was carried into the house and placed upon a bed, and a physician immediately sent for. He rallied partially about one o'clock, and called for "Boss" (the nickname by which he called "our child," George); the child was handed to him, but he soon relapsed, and did not again revive that she saw before his death.

This was a narrative sufficiently touching, and quite circumstantial, no doubt. But was it true? Was the case one of a marriage solemnized in form, and kept a secret for five-and-twenty years; a romance, perhaps—discovered only in the end, by relatives not enriched, to be a reality. Or was it one where the relations between the parties were meretricious merely?

This was, in fact, the great question in controversy in the case; and the question to which the testimony was principally if not altogether directed.

There were facts that inferred a belief that it was the former. There were facts that induced a conclusion that it was the latter. Among those of the second class were the following:

As soon as it was discovered that Dr. Crawford had died intestate, the question arose, of course, "to whom shall administration of his estate be granted?" Mr. Blackburn claimed it on the one hand. Mr. George Thomas Crawford —the oldest of Mr. Crawford's children and his only son— upon the other. The Orphans' Court of Prince George's County, to which a decision of the question belonged, referred it to a jury to decide. The matter was put before them in the form of specific questions, one of them being, "whether, either before or after the birth of the said George Thomas Crawford, Mr. Crawford was ever lawfully married to Miss Elizabeth Taylor or not?" On the evidence, as then put before them, that jury found that he was not. Mr. Crawford's other children, the three daughters, were, however, no parties to this proceeding. The administration was finally granted to Blackburn.

So, too, a solemn act of Mr. Crawford himself, and his directions when performing it, tended to the conclusion of no marriage. In June, 1844, being desirous to make his will, he called on his friend and general professional adviser, Mr. Bowie, of Baltimore, to prepare a draft of it for him. On that occasion, as it appeared at a later day, and from Mr. Bowie's own narrative, he had a conversation with that gentleman as to the best mode of securing his property to his children; asking Mr. Bowie's advice in the matter. In the course of this conversation Mr. Crawford produced certain drafts of promissory notes, which he had signed, for the payment of large sums of money to his children, and stated that he had been advised to make the notes as provisions for them, by some one or other of his friends. He asked Mr. Bowie what *he* thought of it? Mr. Bowie, who

believed that Elizabeth Taylor was no more than the mistress of Mr. Crawford, and that his children were illegitimate, gave his advice to Mr. Crawford on that hypothesis. He objected to promissory notes, suggesting that they might lead to difficulties between the children and Mr. Crawford's relations, and explained to Mr. Crawford that there were three modes by which he might safely provide for the children, to wit: By a deed of his property, reserving a life estate to himself; *or* by his last will; *or* by marrying Elizabeth Taylor, and legitimating the children; Mr. Bowie strongly expressing his preference for the last-named expedient. Mr. Crawford, however, at once rejected the proposition that he should marry Elizabeth Taylor, and with great warmth declared that he would never do so. Upon this, Mr. Bowie advised him to make a will, and *so* to provide for the children. In accordance with this advice, Mr. Crawford directed Mr. Bowie to prepare the draft of a will, which he (Mr. Bowie) accordingly then did, agreeably to Mr. Crawford's instructions. Mr. Crawford especially instructed Mr. Bowie to describe the children, in this will, *as his natural children by Elizabeth Taylor;* and in consequence of this express direction the children were so described in the will, which was on record in the proper office in Prince George's County.

In time, matters came to the arbitrament of the Federal courts. Mr. Blackburn being in possession of various estates, of which his cousin, Dr. Crawford, had died seized, the children of Mr. Crawford, two of whom, it seemed, were born before the alleged marriage and two afterward, brought ejectment, in the Circuit Court for Maryland, to recover them. The fact of the marriage described by the mother of the children—by one side scrupulously styled Miss Elizabeth Taylor; by the other, as scrupulously, Mrs. Elizabeth Crawford—was, as this court declared, "the central and controlling question in the case." A great variety of evidence was taken. The lady who made so large a feature of the case was herself examined, and testified as it has been already stated. Evidence was given, that before some per-

sons Mr. Crawford called her his wife, and recognized the children as legitimate; as, also, that before others he called her "Miss Betsy," and did not, affirmatively at least, recognize them as born in wedlock at all.

In the progress of the trial, numerous exceptions were taken by one side or the other. Some related to the admission and rejection of testimony; others to the instructions to the jury; the exception to these last being by the defendant only.

To prove the marriage, the counsel of the children, the plaintiffs in the case, offered in evidence the deposition of the Rev. J. P. Donelan, to prove that he had frequently heard *Sarah Evans** say that Mr. T. B. Crawford and Elizabeth Taylor were married. In order to lay a foundation for this testimony, it was proved *aliunde* that Sarah Evans was the sister of Elizabeth Taylor, and that she had been dead several years. The testimony was admitted, under objection by the other side.

They also offered in evidence the following entry in the baptismal register of St. Patrick's Church, in the city of Washington:

"1837, July 30. George Thomas, son of Thomas B. Crawford and Elizabeth Taylor, *his wife*, born 7th of September, 1836.

"*Sponsors*, John and Sarah Evans."

They proved that the ritual and usage of the church required such a register to be kept, and baptisms to be entered in it; and that this entry was in the handwriting of the Rev. Mr. Donelan, who, at its date, was the assistant pastor of the church. The defendant objected to the evidence as inadmissible for any purpose. But if it should be admitted, he contended that it was competent to prove no more than the *fact* and *date* of the baptism. The court overruled both objections, and admitted the entry as evidence, as well of the fact of the said baptism, and of the date thereof, as of the fact that the said George Thomas Crawford was baptized

* The person already mentioned (*supra*, p. 178) as having been present at the marriage.

as the *lawful child** of Thomas B. Crawford and Elizabeth Taylor, his wife.

On the other side, the counsel of the defendant, Blackburn, then offered in evidence a transcript of the record in the Orphans' Court of Prince George's County, Maryland, of the proceedings instituted in that court, touching the grant of administration upon the estate of Dr. Crawford, wherein the defendant, Mr. Blackburn, was petitioner, and George Thomas Crawford, one of the plaintiffs, was defendant, and wherein one of the issues ordered to be tried was, whether Mr. T. B. Crawford was ever lawfully married to Elizabeth Taylor, either before or after the birth of the said George Thomas Crawford. It was proposed by the counsel of Mr. Blackburn to read from the transcript the finding of the jury—which was in the negative—and also to read the order of the court made thereupon. The Circuit Court rejected the evidence.

The same counsel then offered the deposition of the Rev. Timoleon Fiziac, the priest by whom Elizabeth Taylor declared that she was married to Mr. Crawford. Father Fiziac was a native of France, who, after officiating for some years in America, had returned to his own country, and was now resident at the convent of the Sisters of St. Joseph de Cluny, at Limoux. His deposition was taken there under a commission, upon interrogatories. He testified that he was the officiating priest of St. Patrick's Church from 1831 to 1836; that no official register of marriages was kept, but that he kept a private memorandum for himself, and that the alleged marriage did not appear in it; that he was aware the law imposed a penalty for performing the ceremony without a license; that it was his habit to require its production, and that he always required the presence of two witnesses. He declined to annex the memorandum to his deposition. In his cross-examination he said he had no acquaintance with

* The entry, in regard to one of the earlier children, described *it* as the "*natural* child" of the parties.

the parties, and had no recollection of ever having seen them. The ninth and tenth cross-interrogatories, and the answers, were as follows:

"9th. State whether you would not have celebrated a secret marriage between parties living in sin, one or both of whom would only be married on the condition that such marriage was to be kept secret?

"*Answer.* I never did, indeed.

"10th. Are you aware that the penalty for marrying parties in Washington, without a license, was merely a pecuniary fine?

"*Answer.* I don't recollect whether I was aware of any penalty; *but I never married parties without a license.*"

The court excluded all that part of the deposition which related to the memorandum, the answer to the ninth cross-interrogatory, and that portion of the answer to the tenth, which is in italics.

The defendant gave in evidence the will of Mr. Crawford, and proved by Mr. Bowie that it was drawn in conformity to the instructions of the testator. It spoke, as we have already said, of the defendants in error as his natural children by Elizabeth Taylor, and provided for them accordingly. It spoke of her as probably *enceinte* at that time, and provided for the unborn child. The defendant then offered to prove, by Mr. Bowie, what was said by the testator in their interviews preceding the preparation of the will concerning the illegitimacy of the children and his relation to their mother. The court excluded the evidence.

All the evidence being gone through, the plaintiff asked the court to give certain instructions, of which the first and third were thus:

"1st. That if the jury find, from the evidence of Elizabeth Crawford, that she was married at St. Patrick's Church, in the city of Washington, by the Reverend Timoleon Fiziac, then the assistant minister of said church, on the first of September, 1835, to Mr. T. B. Crawford; and shall further find, from the evidence, that two of the lessors of the plaintiff were children of the said

Statement of the case.

T. B. Crawford and the witness, born prior to the marriage, and subsequently to the marriage were recognized and treated by said T. B. Crawford as his children; that the other two lessors of the plaintiff were children of T. B. Crawford and Elizabeth Crawford, were born subsequently to said marriage,—then the verdict must be for the plaintiff.

"3d. That a marriage celebrated as deposed to by the said Elizabeth Crawford, if the jury shall find that it was so celebrated, would not be invalidated because no marriage license had been obtained."

These instructions the court gave; no opposition being made to their being given by the other side.

The defendant asked the court to charge thus:

"1. That it will be competent for the jury, on all the evidence, to find that the cohabitation between Mr. Crawford and Elizabeth Taylor, during the entire period of such cohabitation, was illicit, and that no marriage was ever solemnized between them; and if they so find, their verdict ought to be for the defendant.

"2. That it is competent for them, on all the evidence, to find that no marriage was ever celebrated between the said Crawford and Elizabeth Taylor; and unless they find that a marriage was in fact celebrated between them, their verdict ought to be for the defendant."

These instructions the court refused to give; and independently of requests from either side, charged in substance thus:

"1. If the jury find that T. B. Crawford and Elizabeth Taylor were married *at any time*, and that two of the lessors of the plaintiff were born subsequent to the said marriage, and two of them were born before it, and that those two so born before marriage were, subsequently to its date, acknowledged and recognized by Mr. Crawford as his children, then their verdict must be for the plaintiff.

"2. The jury may find the marriage from the testimony of Mrs. Crawford, if they believe her, or from the acts and declarations of Mr. Crawford, taken in connection with all the other evidence in this case; and such marriage, to be valid in this State, requires only the consent of the parties, and would be

valid, although the jury may find that it was not solemnized before any minister of the gospel.

"3. And if the jury shall find that *at any time* Mr. Crawford and Elizabeth Taylor lived together as man and wife; that he acknowledged that she was his wife, and always treated her as such; and the children which she bore during that time as his children, and permitted them to be called by his name, then the presumption of law is in favor of the legitimacy of said children. But if the jury shall find, from all the evidences in the case, that no marriage ever took place between the parties, then that their verdict should be for the defendant."

The jury found for the plaintiffs; thus finding a marriage. After judgment, the case came on error here; where it was thoroughly argued by *Messrs. Reverdy Johnson and Alexander, for Blackburn, the nephew, plaintiff in error; and by Messrs. Brent and Merrick, for the children, contra.*

The questions considered by this court, on exceptions to the evidence and instructions, in the order which precedes, were these:

1. As to the evidence (the Rev. Mr. Donelan's deposition), that Mrs. Sarah Evans, sister of Elizabeth Taylor, had frequently said that Mr. Crawford and her sister were married; the counsel for the plaintiff in error contending that the declarations of Mrs. Evans, who was in no way related by blood to the family of Crawford, were inadmissible to prove a marriage; and opposite counsel citing and relying on *Moncton* v. *The Attorney-General*,* a decision of Lord Brougham, as establishing a wider doctrine, and to show that they were.

2. As to the entry on the baptismal register of St. Patrick's Church—was it admissible at all; there being no statute in Maryland requiring such registers to be kept? If it was admissible, how far was it evidence? Did it tend to prove legitimacy? or only the fact and date of the administration of the baptism?

3. The testimony of the Rev. Mr. Fiziac, and the action of the court below upon it.

* 2 Russel & Milne, 156.

4. The proceedings in the Orphans' Court of Prince George's County. What was their effect? a matter upon which statutes of Maryland were cited.

5. The matter of Mr. Bowie's testimony. How far did the law of privileged communication apply to the case?

6. The instructions requested, and those given to the jury. How far were they right? and how far the reverse of it?

Mr. Justice SWAYNE delivered the opinion of the court.

We will consider the exceptions, so far as we deem necessary—both as respects the testimony and the instructions—in the order in which they are presented by the record; [the order which precedes. REP.]

The *first* exception relates to the admission of evidence as to what Sarah Evans had said in regard to the marriage of her sister, Elizabeth Taylor, with Mr. Crawford.* Was the testimony rightly admitted?

Greenleaf says:† "It is now settled that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants in the person *from whom the descent is made out*, and their consequent interest in knowing the connections of the family. The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question."

It is well settled, that before the declarations can be admitted, the relationship of the declarant to the family must be established by other testimony.‡

Here the question related to the family of Dr. Crawford. The defendants in error claimed to belong to the family, and to be his nephew and nieces. To prove this relationship, it was competent for them to give in evidence the declarations of any deceased member of that family. But the declarations of a person belonging to another family—such person claiming to be connected with that family only by

* *Supra*, p. 182. † On Evidence, vol. i, § 103.

‡ 1 Taylor on Evidence, § 576.

the intermarriage of a member of each family—rests upon a different principle. A declaration from such a source of the marriage which constitutes the affinity of the declarant, is not such evidence *aliunde* as the law requires.

It is insisted by the defendants in error, upon the authority of *Moncton* v. *The Attorney-General*,* that it was sufficient to show the relationship of the declarant to Elizabeth Taylor. As we understand that case, it has no application to the point under consideration. None of the writers on the law of evidence have given it so wide a scope. Hubback thus† states the principle which it decides: "It is sufficient that the declarant be connected by extrinsic evidence with one branch of the family, touching which his declaration is tendered." Lord Brougham himself said in that case: "I entirely agree that, in order to admit hearsay evidence in pedigree, you must, by evidence dehors the declarations, connect the persons making them, with the family. To say that you cannot prove the declarations of A., who is proved to be *a relation by blood of B.*, touching the relationship of B. with C., unless you have first connected him with C., is a proposition which has no warrant, either in the principle upon which hearsay is let in, or in the decided cases." If it had been proved by independent testimony that Sarah Evans was related by blood to any branch of the family of David Crawford, and her declarations had been offered to prove the relationship of another person claiming, or claimed to belong also to that family, this case would be in point. But the declaration of Sarah Evans, offered to prove that her sister was connected by marriage with a member of that family, was neither within the principle nor the language of that authority.

In *Edwards* v. *Harvey*‡ an issue out of chancery was directed, to try the question whether "A. B., from whom the plaintiff claimed, was not proved to be related to C. D., who was the granting party in the conveyance to the plaintiff." A new trial was moved for, on the ground that the court had rejected a paper offered in evidence by the plaintiff.

* 2 Russel & Milne, 156. † On Succession, 660. ‡ Cooper, 38.

"It was a pedigree drawn out by Bridget Lloyd, a maiden lady, deceased, showing that C. D., who was her relative, was related to A. B." The master of the rolls "refused a new trial, because if Miss Bridget Lloyd's pedigree, written by herself, were evidence for her relation, so would her declaration have been, to show that she was herself entitled to the estate."

In *Doe* v. *Fuller** Chief Justice Best said: "If there were no other evidence than the declarations of *John* to show that James was a member of the family, they could not have been received, as that would be carrying the rule as to the admissibility of hearsay evidence further than has ever yet been done, viz., *to allow a party to claim an alliance with a family by the bare assertion of it.*"

We think the court erred in admitting the testimony.

The next question is as to the entry in the baptismal register of St. Patrick's Church.† The plaintiff in error objected to it as inadmissible for any purpose. If admitted, he contended that it was competent to prove but the fact and date of the baptism. The court overruled both objections, and admitted the entry as evidence, as well of the fact and date of the baptism, as of the fact that the child was baptized "as the lawful child of Thomas B. Crawford and Elizabeth Taylor, his wife."

The register was admissible upon the ground that the entries in it were made by the writer in the ordinary course of his business.

How far such an entry is evidence, is a different question. Upon that subject, Starkie‡ thus lays down the rule: "An entry of the time of a child's birth, although contained in a public register, is not evidence as to *the time of the birth*, unless it can be proved that the entry was made by direction of the father or mother; and this seems to be received as a declaration made by one of them—for a clergyman has no authority to make an entry as to the time of the birth, *and*

* 2 Moore & Payne, 24.

† *Supra*, p. 182.

‡ On Evidence, 612; 2d Lond. ed.

possesses no means for making any inquiries as to the fact." Greenleaf* says: "It is to be remembered that they are not generally evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus a parish register is evidence only of the time of the marriage, and of its celebration *de facto*, for these are the only facts necessarily within the knowledge of the party making the entry."

Without further evidence, the court ought not to have admitted the entry in question for any purpose but to prove the baptism of the child, and the date of the administration of the rite. We think this proposition too clear to require discussion.

The third matter is as to the transcript of the record in the Orphans' Court of Prince George's County, Maryland. It was proposed by the plaintiff in error to read from it the finding of the jury which, upon one issue directed,—that namely whether Mr. Crawford ever lawfully married Elizabeth Taylor, either before or after the birth of George Thomas Crawford—was in the negative: and also to read the order of the court made thereupon.† The court below rejected the evidence.

Such a result, under the laws of Maryland, to which our attention has been called, has all the elements of *res judicata*. The transcript was competent evidence against George Thomas Crawford. As to him it was an estoppel, and barred his right of action. But it did not affect the other defendants in error, who were not parties to the proceeding. If they proved a marriage, as alleged, they were entitled to recover the entire property. This they might have done, although the demise was laid in the declaration as made jointly by all the parties. By a statute of Maryland, a joint demise is made several as well as joint, and a recovery may be had accordingly, by one or more of the lessors. In this case it was immaterial to the plaintiff in error, who recovered. A verdict in favor of one or all was alike fatal to

* On Evidence, § 493. † *Supra*, p. 188.

his claim to the property in controversy. The error of the court, therefore, did him no injury.

We come, in the fourth place, to consider the matter of the testimony of the Reverend Mr. Fiziac, examined in France on a commission, and whose deposition was offered by the plaintiff in error, and in a large part excluded by the court.*

The witness is not very explicit as to the "private memorandum" which he testifies that he kept. We understand, from what is said, that it was a book or paper, in which he entered, or intended to enter, each marriage as it occurred. Such entries, being made by the writer in the ordinary course of his business, are competent evidence.

If offered to prove a marriage, the production of the memorandum would have been necessary, for two reasons: it would have been the best evidence of the existence and contents of the entry, and would have given to the adverse party the means, to which he was entitled, of a cross-examination. Here it was proposed to use the testimony negatively. The object was to draw the inference that the marriage had not occurred, from the fact that no entry of it was found to exist. We think the same considerations apply as if the purpose had been to prove a marriage affirmatively.

While the memorandum was within the reach of the party, proof that it did or did not contain a particular entry could not be received without producing the memorandum itself. In the absence of proof of a further effort to procure the original—or, failing that, of an effort to procure an examined copy—this objection, taken at the proper time, would perhaps have been sufficient to exclude the testimony. If it had been notified in season to the plaintiff in error that the objection was to be made, he might have obviated the difficulty. The deposition was taken in France, under a commission, upon interrogatories by both parties. The objection could not, therefore, be made before the taking officer. It should have been presented, before the trial, by a motion to suppress. At the trial it came too late. It was

* *Supra*, p. 188.

then to be considered as finally waived.* The court, therefore, erred in rejecting the testimony.

In regard to the other exception relating to this deposition, we entertain no doubt. The cross-interrogatories were not very respectful to the witness. His answers were natural and proper, and should have gone to the jury.

The fifth point raised relates to Mr. Bowie.† Was the testimony of this gentleman—the attorney who drew the will of Mr. Crawford, and by whom the plaintiff in error offered to prove what was said by the testator in their interviews preceding the preparation of the will, and, in that connection, concerning the illegitimacy of the children and his relation to their mother—rightly excluded?

It is asserted that the communications upon these subjects to the attorney were covered by the seal of professional confidence, and that he could not, therefore, be permitted to disclose them.

The principle of privileged communications was ably considered by Lord Brougham in *Greenough* v. *Gaskel*.‡ He said: "The foundation of the rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence—in the practice of courts—and in those matters affecting the rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to

* York Co. v. Central Railroad, *supra*, p. 107.

† *Supra*, p. 184.

‡ 1 Mylne & Keen, 98.

consult any skilful person, or would only dare to tell his counsel half his case."

In *Russel* v. *Jackson*,* the contest was between the heirs-at-law and a devisee. The heirs claimed that the devise was upon a trust, unexpressed, because illegal. The question was, whether the solicitor by whom the will was drawn should be allowed to testify what was said by the testator contemporaneously upon the subject? The devisee claimed the benefit of the rule. The Vice-Chancellor said: "When we pass from cases of conflict between the rights of a client and parties claiming under him—and those of third persons—to cases of a testamentary disposition of a client, do the same reasons apply? The disclosure in such cases can affect no right or interest of the client; and the apprehension of it can present no impediment to a full statement to the solicitor, unless he were contemplating an illegal disposition—a case to which I shall presently refer; and the disclosure, when made, would expose the court to no greater difficulty than it has in all cases when the views and intentions of parties, or the objects for which the disposition is made, are unknown. In the case, then, of a testamentary disposition, the very foundations on which the rule proceeds seem to be wanting; and, in the absence of any illegal purpose entertained by the testator, there does not seem to be any ground for applying the rule in such a case. Can it be said, then, that the communication is protected because it may lead to the disclosure of an illegal purpose? I think not; and that evidence, otherwise admissible, cannot be rejected upon such grounds. Another view of the case is, that the protection which the rule gives, is the protection of the client; and it cannot be said to be for the protection of the client that evidence should be rejected—the effect of which would be to prove a trust created by him, and to destroy a claim to take beneficially by the parties accepting the trust."

This reasoning applies to the declarations of the testator here in question. How can it be said to be for his interest

* 16 Jurist, 1, 117.

to exclude any testimony in support of what he solemnly proclaimed and put on record by his will? Especially can this be said in regard to property to which he never had or assumed to have any title, and in regard to a claim by others to that property, which he did all in his power, by his will, to foreclose?

But there is another ground upon which we prefer to place our decision. The client may waive the protection of the rule. The waiver may be express or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its object, and in direct conflict with the reasons upon which it is founded.

Finally, as to the instructions to the jury asked and refused, and as to those given.*

The first and third instructions offered by the defendants in error were properly given. The two instructions submitted by the plaintiffs in error were unexceptionable, and should also have been given. The three instructions given by the court *sua sponte* were characterized by a common error. They submitted to the jury, as a question to be considered, whether there was not a marriage at a different time and place, and contracted in a different manner from that alleged by the putative wife, Elizabeth Taylor. Her testimony was clear and positive. It was wholly inconsistent with such a proposition. If there were none as alleged by her, clearly there was none at any time. This was the hinge upon which turned the controversy. All the testimony clustered about and related to that inquiry. The jury should have been so instructed, and their deliberations confined accordingly. Lord Hale says, they should be told "where the main question or the knot of the business lies."† The

* *Supra*, pp. 184–6. † History of the Common Law, 256

further inquiry did not arise in the case. What was said could hardly fail to mislead and confuse. It permitted them to substitute conjecture for deduction, and opened a field beyond the sphere of the case, where the means of error were abundant.

The third of these charges is liable to a further objection. It instructed the jury, that if the facts were as there stated, "the presumption of law was in favor of the legitimacy of the children." Under such circumstances the law makes no presumption. The question to be determined was one of fact and not of law. The facts referred to were a part of the evidence. They were to be weighed against the countervailing evidence. They might, by possibility, all be true, and yet no marriage have occurred, and the children all be illegitimate.

In our view of the case, the question of a marriage *per verba de presenti* did not arise. We have, therefore, not considered that subject.

JUDGMENT REVERSED, with costs, and the case remanded to the Circuit Court, with an order to issue a *venire de novo*.

Mr. Justice CLIFFORD dissenting.

I dissent from the judgment of the court in this case, and that is all I think it necessary to say in reply to several of the prominent topics discussed in the opinion of a majority of the court. But there are three propositions laid down in the opinion to which I desire specially to refer as not receiving my assent, because I think they are of some practical importance.

1. The Circuit Court admitted the church record, or evidence of its contents, after proof of its loss. The effect of the decision here is that it was not admissible. Unless I am greatly deceived, the ruling of the Circuit Court is sustained by all the authorities upon the subject. Apart from authorities it seems to me that it was correct in principle, as evidenced by the general course of practice.

2. Second proposition referred to has respect to the testi-

mony of the attorney. I think it was properly excluded as falling within the rule of privileged communication; and I am also of the opinion that the suggestion of waiver is utterly without foundation or just pretence.

3. Reference is made in the third place to the construction given to the charge of the Circuit Court. Rightly interpreted, the charge, as it seems to me, is correct; but the opinion of the majority of the court places a construction upon it which I think does great injustice to the judge who presided at the trial.

Having stated the three propositions to which I dissent, I do not wish to add anything to the statement.

BLOSSOM v. RAILROAD COMPANY.

1. A bidder at a judicial sale at public auction, whose bid has not been accepted,—the sale being adjourned for sufficient cause and finally discontinued—cannot insist, even though he have been the highest and best bidder, on leave to pay the amount of his bid, and have a confirmation of the sale to *him*.
2. The marshal, or other officer, who makes a sale of real property under a decree of foreclosure, possesses the power, for good cause shown, in the exercise of a sound discretion, and in subordination to the superior control of the court over the whole matter of the sale, to adjourn the sale from time to time.
3. In a case where the decree was that the sale should be made *unless the mortgagors should previously pay the mortgage debt*, a few short adjournments for the purpose of enabling the mortgagors to make an arrangement to pay it, are adjournments for sufficient cause, although such adjournments have been made by direction of the complainant's solicitor. And if, prior to the day to which the sale stands adjourned, the mortgagors come in and pay the complainants the amount of the decree, &c., the sale may properly be discontinued altogether.

THE Milwaukee and Chicago Railroad having mortgaged their railroad, and suit having been brought in the Federal court for Wisconsin, to foreclose the mortgage, a decree was obtained that the mortgaged premises should be sold at

public auction, under the direction of the marshal, *unless the mortgagors, previously to such sale, should pay to the complainants the sum of* $254,175—the amount of the decree. The marshal, accordingly, offered the premises for sale on the 6th of June, 1862, but no bids being received, he adjourned it "by direction of the complainant's solicitor," to the 19th of the same month, at the same hour and place. At the time and place of adjournment he put up the premises again, and one Blossom bid $250,000 for them; this being the highest and best bid received at that time. Fearing that the property would be sacrificed, if the sale should be completed, the agent of the stockholders applied to the *solicitors of the complainants*, requesting that the sale might be postponed for a short time to enable the respondents to make some arrangements to pay the amount of the decree without a sale of the property. *The solicitors gave such directions*, and the marshal again adjourned the sale; the adjournment being to the 21st June—two days—and the marshal giving notice that at the expiration of this time the sale would be opened at the same hour and place, and with the bid of $250,000 already made by Blossom. During these two days the mortgagors made arrangements to pay the mortgage, but had not been able by the 21st to have the money actually in hand. The sale, after being opened, and after Blossom had increased his bid to the full amount of the mortgage debt—but no other bids being received—was again adjourned by *direction of the complainant's solicitor;* this adjournment being to the 1st October, 1862, and being also the second adjournment made by direction of the solicitor aforesaid, after the bid of $250,000 had been made. On this 1st October the sale was again opened, and *by the same direction* further adjourned till the 15th January, 1863; this being, of course, the third adjournment made by the same direction, and after Blossom's bid. Previous to this 15th January, however, the company had paid the amount of the decree, and the marshal by order of the *complainant's solicitor* discontinued the sale altogether.

On the 9th October, 1862, Blossom, by petition to the

court below—sworn to and stating that "he made both bids in good faith, and has been ever since and now is ready to comply with his said bid, and hereby offers to bring that amount into court"—applied to have the sale confirmed to *him* on his bid as increased to the full amount of the decree of foreclosure and sale, but the court denied the petition, and he appealed here.

It having been lately decided in this court, on a motion to dismiss his appeal, that he was entitled to be heard here,* his case now came on upon its merits.

Messrs. Cushing and Carpenter, for the appellant Blossom.

I. *As to the effect of the bid:* When this case was here before, the court said: "A purchaser or a bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim at the hands of the court, such relief as the rules of equity proceedings entitle him to."

What then are the rights which a purchaser, a stranger to the suit, acquires, by making a *bonâ fide* bid, which he offers to give effect to by payment to the marshal?

In foreclosures under decree in chancery, the mortgagee asks the court to take to itself the mortgaged premises, and hold or dispose of them for his benefit. This the court does by ordering the property to be sold to raise the amount due. "A decree for a sale to effect a partition, or to pay debts, virtually," says one case,† "*takes possession of the estate and vests it in the court for the purpose of distribution.*" The rights of all parties are in fact merged in the decree of foreclosure, and possession is vested by the decree of sale in the court, for the purpose of enabling it to sell the property and give possession. In one New York case,‡ the chancellor says: "Both parties appear to have fallen into the *very common error* of supposing that the owner of the decree had the

* Blossom v. Railroad Co., 1 Wallace, 655.

† Williams's Case, 3 Bland, 215.

‡ Snyder v. Stafford, 11 Paige, 76.

right to control the action of the master, and to direct which parcel should first be sold;"—an error which the chancellor repels. In another,* it was held, that the complainant in whose favor a decree had been rendered in a foreclosure case, could not control its execution to the prejudice of other parties interested; and that defendants might apply to the court to have the execution of the decree committed to them, if the complainant unreasonably neglected to proceed to a sale. In a third,† Nelson, J., speaking of sales by the master in foreclosure causes, says: "I am aware that these officers usually follow the direction of the plaintiff, or his solicitor, in this respect, and their interest perhaps may lead them to do so, as they are usually selected by the parties, *but there is nothing in the nature of the office, or the duties belonging to it, which puts them under the control of the parties.* The interposition of an officer to sell the property of defendants at auction would be a useless ceremony *if the officer was to be under the direction of the plaintiff.* If the master is not only independent of the party, but bound to execute the functions of his office, I should like to know upon what principle the bid of a party or his solicitor can be at all sustained. The party would be substantially both auctioneer and bidder."

In sales under decrees, according to the English practice, there is no such thing as striking off or knocking down the property. The bids are received, and the best bid is reported to the court. The form of a report is as follows:‡ "George Ansley attended the sale," &c., *and offered* to give for the purchase of, &c., "and no person having offered to give more for the said," &c., "*I do allow* the said George Ansley to be the best purchaser thereof," &c., &c. In all the English cases the language is, "A. R. having been reported the best bidder or purchaser."

In *Blount* v. *Blount*,§ Lord Hardwicke, says: "Where estates for lives have dropped in between a person's being

* Kelly v. Israel, Id. 147.

† Collier v. Whipple, 13 Wendell, 224.

‡ Bennet's Master, 125.

§ 3 Atkyns, 637; and see Ex parte Manning, 2 Peere Williams, 410.

reported the *best* purchaser by the master, and his taking possession," &c.;—showing that the master does not pretend to strike off the property, but simply reports the facts to the court. It is the court then that enters into contract relations with strangers to the suit, whom it invites by its advertisement to become purchasers of the property; and it is of no consequence whether the marshal strike off the property or not. *He* cannot thereby complete the sale: it must be confirmed by the court. In sales on execution the officer completes the sale, and therefore it is the striking off of the property that evidences its consummation. But in a sale under decree, the officer need only report to the court who is the highest and best bidder.

In the New York case of *Brown* v. *Frost*,* it was asserted at the bar to be a rule of chancery that the right of redemption remains after the biddings until the sale was confirmed by the court. But the chancellor says: "If such a rule exists it is one which I never heard of before; and no such right has ever been claimed by the owner of mortgaged premises, in any suit or proceedings before me, during the fifteen years in which I have presided in this court. . . . *The former owner of the equity of redemption cannot prevent the completion of the sale, and the confirmation of the report, by tendering or offering to pay the amount of the decree, with interest and costs.*"

If Blossom had refused to perform his part of the contract, or had been unable to do so, the court might have ordered the property to be resold at his risk, holding him liable for any deficiency.† The bid compelled him to keep this large sum at command to meet it. Good faith and public policy require that he should be protected in the corresponding rights acquired by him as a purchaser.

II. *As to the adjournments.* Here are no less than four different adjournments—running over a term of seven months—for the mere purpose of enabling a delinquent debtor to

* 10 Paige, 246–7.

† Millikin v. Millikin, 1 Bland, 541; Harding v. Harding, 4 Mylne & Craig, 514; Gray v. Gray, 1 Bevan, 199.

redeem. Blossom, on the 19th June,—the day when the sale was adjourned for the second time,—having bid nearly the whole amount of the debt due, the large sum of $250,000. If this court shall hold that he acquired no rights by so doing; that the complainants had the right to control the marshal, and continue the sale from time to time, at their pleasure, until the purchaser should be ruined by keeping his money at command, what *bonâ fide* bidder will ever again incur the hazard and inequality of such a rule, by bidding for property hereafter offered for sale by a Federal court? Certainly the right claimed by the complainants would put every mortgaged railway corporation in the power of its mortgagors, and would enable them to acquire its property at their own price. For if they have the power to adjourn the sale three times, they may a hundred, and until every competent bidder is ruined, or consents to withdraw from the biddings. The complainants can then buy for what they will.

Messrs. Cary, Buckley, and Brown, contra.

I. *What was the effect of the bid?* By appearing at the sale and bidding for the property, Blossom simply made a proposition, which, if it had been *accepted*, would have bound him to its performance; but until it was accepted, and the sale was consummated by the property, on that bid, being struck off, he was not bound, and he was at liberty to withdraw his bid at any time he chose before such acceptance.

The American practice of judicial sales is to sell at auction, and in all cases the officer making the sale designates the purchaser by accepting his bid, and formally *striking off* the property to him, in presence of the spectators. In this case the order of the decree was express that the property should be sold at public auction, and the well-settled rule that a bidder may at any time retract, of course applies.

Again, the officer does in all cases report that he has *sold* the property, naming the person purchasing; also, stating the amount for which the sale was made, and that it was the highest and best bid. It is true that all such sales are within

the power of the court, either to confirm or to set aside. But the court never confirms or sets aside a sale until it has been made and reported by its officer; and probably the case at bar is the first instance of an attempt in this country to have an unaccepted bid, at a judicial sale, declared a valid and binding sale, and confirmed as such. Under our practice, there is no difference whether the sale is on execution or under a decree, so far as striking off the property to the highest bidder is concerned, in order to consummate a sale.

We are aware that the English practice is somewhat different; but their practice, in this respect, is not in force in this country. If, however, the practice of the English courts of chancery is to govern, then no bid was ever made. In England, the officer has a book in which each person writes out his proposition and signs it. No other form of bids is considered; here there was no written offer, and no memorandum made by the marshal or signed by them. And even after the biddings are closed and the purchase-money paid, the bidder in England acquired no interest in the land until after confirmation. And if the premises are destroyed by fire, the bidder is not bound by his bid.*

II. *As to the adjournments.* The decree itself gives the defendant the right to pay off the mortgage at any time before the sale; not before the *day* of sale, or the *hour* of sale, or before the first bid, but before the sale itself. But when has a sale taken place? It is when the biddings are completed as required by the rules and practice of the court; when the marshal has ascertained by actual experiment (crying the property, and awaiting a reasonable time) that higher bids than those already made cannot be obtained; and has by public declaration so determined, that the sale has taken place.

That a defendant cannot, at any time before a sale of his property is consummated, prevent such a sale by the payment of the judgment or decree, *to satisfy which alone the sale is made*, is a doctrine not to be entertained. The object of

* Ex parte Minor, 11 Vesey, 559; Turgg v. Fifield, 18 Id. 517.

courts of chancery is not to punish the mortgagor or sell his property, but to protect the ultimate rights of the mortgagee. It will, therefore, allow the defendant every indulgence consistent with those rights. Even at law the officer is bound to protect the property against sacrifice, and may postpone the sale in the exercise of a sound discretion, after bids.*

The case does not at all show that Blossom was compelled, as argued on the other side, to keep a large sum of money on hand to meet his bid, or that he ever could have raised it. He made no tender of money, and this alone would be conclusive against him.

Mr. Justice CLIFFORD delivered the opinion of the court.

Respondents mortgaged their railroad to certain trustees as a security for moneys loaned and advances of various kinds, and to defray the current expenses of operating the railroad and of keeping the same in repair. Suit was brought by the trustees and certain creditors, named in the bill of complaint, to foreclose the mortgage for a breach of the conditions, and the cause proceeded to a decree of foreclosure and of sale. Substance of the decree was that the mortgaged premises should be sold at public auction, under the direction of the marshal of the district, unless the mortgagors should pay to the complainants, previous to the sale, the sum of two hundred and fifty-four thousand one hundred and seventy-five dollars, with interest from the date of the decree. Pursuant to that decree, the marshal, on the 6th day of June, 1862, offered the mortgaged premises for sale, but as no bids were received he adjourned the sale, under the instructions of the solicitors of the complainants, to the 19th day of the same month, at the same hour and place.

Report of the marshal also shows that he again offered the premises for sale at the time and place of adjournment, and that the appellant bid for the same the sum of two hundred and fifty thousand dollars, which was the highest and best

* Tinkham v. Purdy, 5 Johnson, 345; Leader v. Denney, 1 Bosanquet & Puller, 359.

bid received at that time. Fearing that the stock would be sacrificed if the sale should be completed, the agent of the stockholders made application to the solicitors of the complainants, requesting that the sale might be postponed for a short time, to enable the respondents to make some arrangements to pay the mortgage debt without a sale of the property. Yielding to that suggestion the solicitors gave such directions, and the marshal accordingly adjourned the sale for the period of two days, giving notice at the time that the sale at the expiration of that period would be again opened at the same hour and place, and that the bid of the appellant would be regarded as pending.

Such an arrangement having been negotiated during those two days, a further adjournment became necessary to enable the parties to carry it into effect; but when the sale was opened for that purpose the appellant was present and increased his bid to the full amount of the mortgage debt, including interest, costs, and expenses of sale. No other bids having been made the sale was adjourned, as directed, to the 1st day of October, and afterwards to the 15th day of January following, but before the day to which the last adjournment was made the respondents paid the amount of the decree to the complainants, and the sale was discontinued.

Record also shows that the appellant applied to the court by petition on the 9th day of October, 1862, to have the sale confirmed to him on his bid as increased to the full amount of the decree of foreclosure and sale, but the court denied the prayer of the petition, and from that order the petitioner appealed to this court.

1. Appellant contends that inasmuch as he bid the full amount of the decree, interest, and costs, at a time when the mortgaged premises were duly offered for sale, and inasmuch as his bid was the highest and best bid offered for the premises, it became and was the duty of the marshal to have struck off the property to him as the legal purchaser of the same, and that the District Court erred in denying his petition for the confirmation of the sale. On the other hand, the respon-

dents deny that any sale was ever made, and insist that the bid of the appellant was a mere offer of purchase, which he might withdraw at any time before the bid was accepted or the property was struck off to him, and an entry to that effect was made by the marshal.

2. Sales of mortgaged premises under a decree of foreclosure and sale are usually made in the Federal courts by the marshal of the district where the decree was entered, or by the master appointed by the court, as directed in the decree. Such sales must be made by the person designated in the decree, or under his immediate direction and supervision, but he may employ an auctioneer to conduct the sale if it be made in his presence. Express directions of the decree in this case were that the mortgaged premises should be sold at public auction, unless the respondents, as mortgagors, should, previously to such sale, pay to the complainants the amount of the mortgage debt, as specified in the decree.

3. Contracts for the purchase and sale of goods or lands at public auction are contracts founded upon mutual promises and a mutuality of obligation, and consequently they cannot be regarded as having been perfected and made binding unless they have received the consent of the parties. Consent of parties being essential to the contract set up in this case, it becomes important to ascertain in what way and to what extent such assent must be manifested, and to distinguish accurately between mere offers or proposals by the one party not accepted or approved by the other, and mutual and positive engagements which neither party can retract or withdraw.*

Unaccepted offers to enter into a contract bind neither party, and can give rise to no cause of action; as, for example, if one merchant offer to sell goods to another, such an offer is not binding until it has been in some form accepted by the party to whom it was made. Liability cannot arise in such a case, because the party making the offer can-

* Addison on Contracts (ed. 1857), 28–154.

not be held answerable to the other for not selling the goods, unless that other by accepting the offer has bound himself to purchase.

4. Biddings at an auction, says Mr. Addison, are mere offers, which may be retracted at any time before the hammer is down and the offer has been accepted.* Leading case upon that subject is that of *Paine* v. *Cave*,† where it was expressly held that every bidding at an auction is nothing more than an offer on one side until it has received the assent of the auctioneer as the agent of the owner. Supreme Court of Pennsylvania held, in the case of *Fisher* v. *Leitzer*,‡ that a bidder at a sheriff's sale has a right to retract his bid before the property is struck down to him, and that the sheriff has no right to prescribe conditions which will deprive him of such a right. Express ruling was that a bid at an auction before the hammer falls is like an offer before acceptance, and that when the bid is withdrawn before it is accepted there is no contract, and that such a bidder cannot be regarded in any sense as a purchaser. Rule, as laid down in the last edition of "Story on Sales," is substantially the same as that adopted in the preceding case. Speaking of ordinary sales at an auction, the author says that the seller may withdraw the goods or the bidder may retract his bid at any time before they are struck off, and the reason assigned for the rule is, that so long as the final consent of both parties is not signified by the blow of the hammer there is no mutual agreement to a definite proposition.§ But as soon as the hammer is struck down, says the same author, the bargain is considered as concluded, and the seller has no right afterwards to accept a higher bid nor the buyer to withdraw from the contract.‖ Same rules prevail upon a sale under common law process as in other cases of sales at

* Addison on Contracts (ed. 1857), 26. † 8 Term, 148.

‡ 28 Pennsylvania State, 308.

§ 1 Sugden on Vendors and Purchasers, 25.

‖ Rutlidge v. Grant, 4 Bingham, 653; Cook v. Oxley, 3 Term, 654; Adams v. Linsdell, 1 Barnewall & Alderson, 681; Story on Sales, § 461.

public auction, so far as respects the question now before the court. Until the property is actually struck off to the bidder he may withdraw his bid as a mere offer or proposition.*

5. Judicial sales made under the decretal orders of courts of chancery, are also, in this country, governed substantially by the same rules, except that such sales are usually made by the marshal, or a master in chancery acting as an officer of the court, and are always regarded as under the control of the court, and subject to the power of the court to set the sale aside for good cause shown, or open it any time before it has been confirmed, if the circumstances of the case require the exercise of that power. Doubtless such sales are usually conducted under the advice of the solicitor of the complainant, and it is sometimes said that the solicitor, in all questions arising between the vendor and purchaser, must be considered as the agent of all the parties to the suit; but it is believed that the remark must be received with some qualification.† Suppose it to be so, however, in a qualified sense; still it is true that the marshal or master, as the case may be, is the officer of the court, and that as such his acts and proceedings are subject to the revision and control of the court.‡ In sales directed by a court of chancery, says Judge Story, the whole business is transacted by a public officer, under the guidance and superintendence of the court itself. Even after the sale is made, it is not final until a report is made to the court and it is approved and confirmed. Either party may object to the report, and the purchaser himself, who becomes a party to the sale, may appear before the court, and, if any mistake has occurred, may have it corrected. He, therefore, becomes a party to the proceeding, and may represent and defend his own interest, and may be compelled by process of the court to comply with the terms of the contract.§

* Crocker on Sheriffs, 201.

† Dalby v. Pullen, 1 Russel & Mylne, 296.

‡ Collier v. Whipple, 18 Wendell, 229.

§ Smith v. Arnold, 5 Mason, 420.

6. Subject to those qualifications, and perhaps some others which need not be noticed, the question of sale or no sale, when it arises under a state of facts such as are exhibited in this record, may be fully tested by substantially the same rules as those which apply in cases of sales under common law process, or in other cases of sales at public auction. Tested by those rules, it is clear to a demonstration that there was no sale of the mortgaged premises in this case, because the property was never struck off to the appellant, nor was his bid, by act or word or in any manner, ever accepted by the seller, and the record shows that, at the hearing in the court below, nothing of the kind was pretended by the appellant. Instead of setting up that pretence, his complaint was that the marshal erred in refusing to accept his bid, which, if possible, is less defensible upon the facts and circumstances of the case than the theory of the sale and purchase.

7. Officers appointed under such decrees, and directed to make such sales, have the power to accomplish the object; but they are usually invested with a reasonable discretion as to the manner of its exercise, which they are not at liberty to overlook or disregard. Acting under the decree, they have duties to perform to the complainant, to the vendor and purchaser, and to the court, and they are bound to exercise their best judgment in the performance of all those duties. Such an officer, in acting under such a decree, if directed to sell the property, should adopt all necessary and proper means to fulfil the directions; but he should, at the same time, never lose sight of the fact that, unless he is restricted by the terms of the decree, the time and manner of effecting the sale are, in the first instance, vested in his sound discretion. Usual practice undoubtedly is, that the officer in selling the property acts under the advice of the solicitor of the complainant; but it cannot be admitted that his advice is, under all circumstances, obligatory upon the officer.

Granting that solicitors may properly advise the officer, still it must be borne in mind that the authority and discre

tion in making the sale are to a certain extent primarily vested in the officer designated in the decree. Unreasonable directions of the solicitor are not obligatory and should not be followed, as if the solicitor should direct the property to be struck off at great sacrifice when but a single bidder attended the sale. Under such circumstances, the officer might well refuse to do as he was directed, and he might be justified in postponing the sale to a future day to prevent the sacrifice of the property. Every such officer has a right to exercise a reasonable discretion to adjourn such a sale, and all that can be required of him is, that he should have proper qualifications, use due diligence in ascertaining the circumstances, and act in good faith, and with an honest intention to perform his duty.

General rule is, that a sheriff is not bound to obey the directions of the attorney of the creditor to make an unreasonable sale of the property of the debtor, if he sees that the time selected, or other attending circumstances, will be likely to produce great sacrifice of the property; but he may in such a case, if he thinks proper, postpone the sale, especially if it appears that the creditor will not sustain any considerable injury by the delay; and no reason is perceived why the same rule may not be safely applied in judicial sales made under the decretal order of a court of chancery.

8. Courts often say that an auctioneer is solely the agent of the seller of the goods until the sale is effected, and that then he becomes also the agent of the purchaser, for certain purposes; but the marshal or master, in carrying out a decretal order, is more than an auctioneer. They have duties to perform for all concerned, and in the performance of those duties they may adjourn the sale for good cause shown. Repeated decisions have established that rule, and in the leading case of *Collier* v. *Whipple*,* the court went further, and held that such an officer was bound to exercise a reasonable discretion in that matter. Same rule had been pre-

* 13 Wendell, 229.

viously sanctioned in numerous cases,* and was expressly laid down by the chancellor in the case of *Kelley* v. *Israel*,† which is one of the latest cases upon the subject.

But the record shows, in this case, that the bid of the appellant was never accepted, and that the adjournments were made by the direction of the solicitors of the complainants to enable the respondents to pay the mortgage debt and save the mortgaged property from sacrifice. Negotiations to that effect were opened between the parties to the suit on the day the first bid of the appellant was made, and they were completed within two days, so that all concerned knew, or might have known, that a sale had become unnecessary. Subsequent postponement took place to enable the respondents to carry the arrangements into effect. They paid the debt, and the complainants executed a discharge for the same. Justice has been done, and all are satisfied except the appellant, and he has no just ground of complaint.

DECREE AFFIRMED WITH COSTS.

TURNPIKE COMPANY *v.* THE STATE.

1. If a State grant no exclusive privileges to one company which it has incorporated, it impairs no contract by incorporating a second one which itself largely manages and profits by to the injury of the first.
2. In such a case it is no defence to a *scire facias* against the first for non-user or abuser of its franchises, that the State had incorporated the second, was in part managing it, and largely profiting by it; and in consequence of all this, that the revenues of the first company were so far lessened that it could observe its charter no better than it did.
3. If a State injure one incorporated company by the unlawful grant of a charter to another and rival one, the remedy of the first company is by proper proceedings to restrain the second from getting into operation, and not by neglecting its own duties.

IN 1812 the State of Maryland incorporated a company to

* Tinkham v. Purdy, 5 Johnson, 345; McDonald v. Neilson, 2 Id. 190; Keightly v. Birch, 3 Campbell, 321; Leader v. Denney, 1 Bosanquet & Puller, 359.

† 11 Paige, 154.

build a *turnpike* road between Baltimore and Washington. The company by its charter had power to take tolls and was bound to erect bridges and keep them and the road in good repair. *In regard to its privileges generally, there was nothing special about it.*

In 1831 the same State granted a charter to a railroad company to make a railroad between the same cities, the line of which ran near to and parallel with the track of the turnpike.

The turnpike company not having kept its road and bridges in repair, while it *yet demanded tolls*, the legislature of the State in 1860 directed their attorney-general to issue a *scire facias* against it, to forfeit its charter; which writ was issued accordingly.

It was set up as a defence to the *sci. fa.* that the State had, in disregard of the Constitution of the United States, passed laws "impairing the obligation of contracts," in that with the grant of a charter to the turnpike company in force, it had incorporated a company to make a railroad right alongside of it, which second road had every year been transporting great numbers of persons and large amounts of property that but for *it* would have been carried on the turnpike, and had now by statute directed the *sci. fa.*; that the turnpike company being by the charter to the railroad corporation deprived of much of the income which but for this they would have received, it had become "impracticable for them, with all the income that they received from such persons and property as pass upon the turnpike road, to maintain and keep it in any better order and repair than it was kept in."

The turnpike company further set up that the railroad had been made not only under the authority of the State but to a considerable extent with the State's own money; the State, in addition, managing it largely, and getting from it one-fifth of the whole amount received for the transportation of passengers.

The Court of Appeals of Maryland, where the case finally got, considered the defence insufficient, and gave judgment

of ouster of the franchise. The charter of the turnpike company was thus annulled. The case was now here on error.*

Messrs. Dobbin and Robinson, for the turnpike company, plaintiffs in error, contended that the charter of 1812 made a contract, persons having parted with their property on the faith of it;† that under this charter the turnpike company had a right to take and enjoy the tolls and other privileges and immunities granted by it, and for which the original cost of constructing the road and the obligation, by continuing outlays to keep it in order, was a consideration. That the State, by authorizing a rival road, had violated that contract; and by diverting and carrying away the tolls from the turnpike company—as owing to the new road being a railroad and having greater facilities for carrying passengers and freight it did—it had, *itself*, disabled the turnpike company from keeping its road in repair. That the State having thus prevented the turnpike company from performing its duty, and still furthering a prevention—being itself a gainer moreover by what it did and was still doing—it could not take advantage of the resulting incapacity of the turnpike company to keep its road in order.

The case was argued with profound reference to the books; and the learned counsel cited very numerous authorities, beginning with the Year Books, Keilwey, Sir Francis Moore, Bulstrode, Godbolt, and other early reporters,‡ and coming down to the latest of the modern,§ to show a universal con-

* Under the 25th section, of course, of the Judiciary Act of 1789. See *supra*, p. 57.

† Hathorne *v.* Calef, 2 Wallace, 21; approving Curran *v.* State of Arkansas, 15 Howard, 313.

‡ Among the early cases were: Joan, Queen of England, widow of Henry IV, *v.* Lyle, 9 Henry VI, Year Book of Henry VI, folio 44; Placitum 25 another case in the Year Book of 6 Edward IV, folio 1-2; Placitum 4: both explained in West *v.* Blakeway, 2 Manning & Granger, 745, notes *c* and *b*; Keilwey, 84 *b*, a case in 18 Henry VII; Bedels' Case, 2 Leonard, 115; Carrell *v.* Read, Owen, 65; S. C., Moore, 402; Slade *v.* Thompson, Cro. Jac. 874, S. C., Rolle, 136; City of London *v.* Greyme, Cro. Jac. 181; S. C., Moore, 877; Quick *v.* Ludborrow, 3 Bulstrode, 30.

§ Among the later cases, People *v.* Bartlett, 3 Hill, 570; Cort *v.* Amber

currence of the courts on the subject; and that it was an ancient, settled, and most just rule of law and morals, that a covenantor was discharged from his obligation when the party for whose benefit it is made has performed an act by which such covenantor is incapacitated to observe his contract; and that where forfeiture was the penalty provided for breach, the other party was not permitted to take advantage of it.

Messrs. Randall and Poe, contra, citing among other cases, *Charles River Bridge* v. *Warren Bridge*;* *Richmond Railroad Co.* v. *Louisa Railroad Co.*;† *Washington and Baltimore Turnpike Company* v. *Baltimore and Ohio Railroad Co.*‡

Mr. Justice NELSON delivered the opinion of the court.

The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defence is, that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms, or by necessary implication; and hence whatever may have been the general injurious effects and consequences to the company, from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress.

It might have been very proper for the State, when chartering the railroad, to have provided for compensation for the prospective loss to the turnpike company, as has frequently been done in other States, under similar circumstances; but this was a question resting entirely with the legislature of the State, and their action is conclusive on the subject.

There is another answer to the defence in this case, even assuming that the charter of the turnpike company contained exclusive privileges that forbade the legislature of the State incorporating the railroad company.

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gate Railway, 17 Adolphus & Ellis, New Series (79 English Common Law), 146; Pole v. Cetchovitch, 9 Common Bench, New Series (99 E. C. L.), 488.

* 11 Peters, 536–553. † 13 Howard, 81. ‡ 10 Gill & Johnson, 392

Statement of the case.

The remedy was not in neglecting to repair the road, and at the same time collect the tolls. It was in restraining, by the proper proceedings, the railroad company from constructing their road. The breach of the contract on the part of the State furnished no excuse for the turnpike company in disregarding their part of it which was a burden, to wit, the repairs, while, at the same time, insisting upon the observance of the part beneficial, to wit, the collection of the tolls.

JUDGMENT AFFIRMED.

[See *supra*, p. 51; The Binghamton Bridge.]

THE CORNELIUS.

1. Presumption of an intent to run a blockade by a vessel bound apparently to a lawful port, may be inferred from a combination of circumstances, as *ex. gr.* the suspicious character of the supercargo; the suspicious character of the master, left unexplained, though the case was open for further proof; the fact that the vessel, on her outward voyage, was in the neighborhood of the blockaded place, and within the line of the blockading vessels, by *night*, and that her return voyage was apparently timed so as to be there by night again; that the vessel (though in a leaking condition, that condition having been known to the master before he set sail), paid no attention to guns fired to bring her to, but, on the contrary, crowded on more sail and ran for the blockaded shore; and that one witness testified *in preparatorio* that the master, just before the capture, told him that he intended to run the blockade from the first.
2. Although in such cases it is a possible thing that the intention of the master may have been innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intent.

THE schooner Cornelius and her cargo were captured by the government vessel Restless, and condemned as prize of war by the District Court for the Eastern District of Pennsylvania for an attempt to run the blockade established by

our government, during the Southern rebellion, of the port of Charleston, by putting into a neighboring inlet called Bull's Bay, from which Charleston was easily to be reached. Simonson, the master and owner of the schooner, and several claimants of the cargo, appealed to this court from that decree.

The facts, as assumed by this court from the evidence, were essentially these.

The master and claimants of the cargo were citizens of the United States. The vessel had been chartered by M. H. Vandyke for a voyage from New York to *Port Royal*—a place near Charleston, but in possession of the government, and, at the moment, open to trade—and back; to be terminated at Port Royal, *at the option of the charterer*. It was pretty clear that the cargo was entirely got up by Vandyke, was partly owned by him; and the remainder, if not owned, was controlled by him. Nothing appeared as to Vandyke's residence, his place of business, his character or standing in reference to the government and the rebellion, or where he was from the time the vessel left New York, which was June 15th, until he appeared at Port Royal, October 8th; two days before the vessel set out again for *some* point from that place. And although the case was open for further proof, and Vandyke made the test-oath to his own claim, the court was left in the dark as to these particulars.

A supercargo of his selection was placed on board, who had but recently come from the States in rebellion.

The vessel cleared for Port Royal, and reached that place July 1, 1862. She passed Bull's Bay on her voyage *to* this place in the *night*, and stood off and on all night until daylight next morning, being fired at twice by the Restless, one shell reaching the schooner, and she leaving the neighborhood only when daylight and the shells of the Restless made it necessary. She remained at Port Royal without unloading until October 10th, when she cleared for New York She set off from Port Royal again at an hour which would have brought her opposite Bull's Bay *in the night;* but in consequence of her leaking a good deal, she did not come

in sight of the blockading vessels watching that inlet till daylight of the 11th. About that time she saw the Restless, who fired at her twice; the shots falling short. She took no notice of these except to crowd on more sail. Acting-master Griswold, of the navy, was then despatched in an armed boat after her. His account was as follows:

"I proceeded towards Bull's Bay with all possible speed, hoping to reach the mouth of the narrow channel by which the schooner was trying to run the blockade; but she was too fast for us; for finding that the boat gained, *she set her mainsail and gaff-topsail.* As there was a strong breeze blowing at S. S. W., she went through the water at a furious rate, the pilot evidently well acquainted with the channel. On reaching Bird's Island passage she entered it beautifully, and under all sail fairly flew through the water towards Harbor Creek; seeing which, I tried to cut her off by crossing the shoals close to the island (Bird's); but it was of no use. Suddenly, however, she took the ground, and by the time she floated again I was within a quarter of a mile of her; fired a rifle at her, *but no notice was taken of it.* She still, *under all sail*, tried to reach the main land; again she took the ground. Those on board finding that she was hard and fast, and the boat close on them, gave it up, and hoisted an American ensign in the fore-rigging, port side, union down. The captain said that the flag had been there all the morning, but we could not see it till close on her. It might have been there, however, as they could not have chosen a better place to have hidden it from us. On boarding her, I found the water up to the cabin floor; but on trying the pumps found that she could be kept free by pumping ten minutes in the hour."

The steward, in his deposition, taken *in preparatorio*, stated that, ten or fifteen minutes before the vessel ran aground, the master told him that he had intended to run the blockade from the first.

The claimants of the cargo asserted, under oath, that they had never parted with the ownership of the goods; that they were sent on an honest venture to Port Royal, which had then been opened to trade; and that they had no intention to violate the blockade, and knew of none on the part of the

master. The master asserted, in the same way, that the bottom of his vessel became so worm-eaten, during his long stay at Port Royal, that she began to fill by the time he was fairly out to sea, and that with no intention to break the blockade he was compelled to run into Bull's Bay, and, in order to avoid expense of salvage, to beach his vessel, to save her and her cargo from sinking. The schooner was much worm-eaten, and leaking badly at the time she was beached. But the master had had her bottom examined, and knew her leaky condition before leaving Port Royal, though not, perhaps, the full extent of it; "completely honeycombed," said one witness; "so much so that the mystery was how the vessel could float at all."

The master, Vandyke, and the other claimants, were very explicit in their denial of any intention to violate the blockade.

Before making its decree of condemnation, the District Court submitted to two nautical experts, whom it invited to hear the case as assessors, the question, whether the facts of the voyage on which the vessel was captured were consistent with a destination in good faith from Port Royal for New York continuing without wilful deviation until the time of capture; and whether, if a wilful deviation occurred, it was under circumstances reasonably consistent with innocence of intention with reference to the blockade? The assessors reported it as their belief, that the deviation, under both these propositions, was made by the master with a fraudulent intent to run the blockade at Bull's Bay.

Mr. Ashton, Assistant Attorney-General, for the captors.

1. The decree below is to be taken, *primâ facie*, as right.

Lord Langdale has said that, in an admiralty cause involving a mere question of fact, the Privy Council of England will not differ from the judge of the High Court of Admiralty and reverse his judgment, unless they can clearly come to a contrary conclusion.* The same rule has been acted upon

* The Christina, 6 Moore's Privy Council, 381.

by this court in that class of cases; so that it may be regarded the doctrine as well of the Supreme Court of the United States as of the English Privy Council, that in an admiralty cause, where the question proposed and decided below was one simply of fact, the appellant, as Mr. Justice Grier expresses it in one case, has all presumptions against him, and the burden of proof is cast on him to prove affirmatively some mistake made by the judge of the inferior court, in the law or in the evidence. The decree below will not be reversed upon the showing that there is a theory, supported by some evidence in the cause, on which a different decree might have been rendered.*

That this vessel had deviated from the line of the voyage which she was professedly pursuing, was a patent and conceded fact in the case. The only question, therefore, before the court below was, whether that deviation occurred with a fraudulent intention, on the part of those who controlled her navigation, to violate or evade the blockade. This was a question of fact. If the case could have been submitted to a jury, it would have been a question belonging to them to decide.†

But this case is peculiarly one in which the court should proceed upon the principle just stated. The fact was found against the claimants, not by the court alone, but by the experienced nautical assessors also. The duty performed by these gentlemen was like that frequently assigned by Lord Stowell to Trinity masters in cases involving similar nautical considerations. The proceeding in the case of *The Mentor*,‡ and in the case of *The Neutralctet*,§ before Lord Stowell, was like the proceeding in the present case. The practice is a wise one, and should be encouraged by this court.

The nautical experts not only found the general fact, that there was a wilful deviation, with a fraudulent intent to violate the blockade, but they presented to the court a report

* The ship Marcellus, 1 Black, 417; The Water Witch, Id. 500.

† United States v. Quincy, 6 Peters, 466; Lee v. Lee, 8 Ib. 50.

‡ Edwards, 207. § 6 Robinson, 31.

containing their views on all the *facts* connected with the navigation of the vessel, which entered into the determination of the great question on which the cause depended. This court will regard those facts as *conclusively* found by the assessors; and unless it should affirmatively appear that the inference drawn from them was unwarranted, will not disturb the report.

2. It is an imperative legal presumption from the conduct of the master inside of the blockaded waters, "where the law of war was the rule of navigation," in wilfully and persistently disregarding the summons and warning of the blockading vessel, and proceeding in defiance thereof toward the enemy's coast, that the master intended to violate the blockade.

We hold the particular conduct of this vessel up as presenting in itself efficient ground of condemnation of both vessel and cargo.

We find no reported case precisely parallel to the present; no case where there were so many signs of guilty intent on which the law could fix its presumption, as in this.

The case of *The Charlotte Christine** was that of a neutral Danish vessel, proceeded against in August, 1805, on the ground of a breach of the blockade of the Seine. She was taken off Cape La Heve, which the master had made, according to his allegation, simply to get a pilot for Caen, that cape being the point where pilots usually plied for Caen. It appears that he had passed the English frigates with a signal for a pilot flying and without opposition; but by his own admission, it also appeared that he had stood in within one mile of the shore *after he had perceived a pilot-boat to be coming out to him.* The facts, also, were developed by the evidence that the captured vessel continued to approach the shore after he had been hailed by the captors and had refused to bring to on the first notice. Now, what said Sir William Scott on this case? His opinion, condemning the property, concludes as follows:

* 6 Robinson, 101

Argument for the captors.

"It is admitted that the master had seen the pilot-boat at twelve miles distant early in the morning; that he had hoisted a signal, and perceived the boat to be coming off. What had he to do, then, but to have waited where he was, and where he had passed the frigates, as he says, without being considered to be in a suspicious situation? Instead of this prudent and natural course of conduct, he continued to approach, and in defiance of the captor's boat, since it appears that he did not bring to until a gun was fired at him. The extreme imprudence of this behavior, and the great improbability that any person would so act but from some sinister motive, lays him under the unavoidable imputation of being engaged in an attempt to break the blockade."

The Gute Erwartung,* decided in 1805, is a further adjudication of Sir William Scott on the same principle. The vessel in that case was captured in the same waters and while professedly engaged in the same errand—taking a pilot for Caen—as the Charlotte Christine. The Gute Erwartung was a Lubec ship, sailing from Oporto with an asserted destination to Caen, captured twenty miles from Caen, and about that distance from Havre, a blockaded port. When taken, she was steering "in a course direct to Havre, and with an intention (*not to enter Havre, as was expressly averred*, but) of going on close under the land for the purpose of taking a pilot on board to carry her to Caen." Therefore, Sir William Scott says, "if the situation of the vessel *alone* was to be considered, I should be disposed to acquiesce in this representation of his intentions, and to decree the vessel to be restored on payment of captor's expenses." But that great judge proceeds:

"There is an ulterior circumstance that presents a more unfavorable aspect, which," says he, "places her, in construction of law, in the same situation which the other vessel (the Charlotte Christine, *supra*) had actually reached," (viz., so near the enemy's coast as to expose the capturing vessel to the annoyance of the enemy's guns.) "For, the master says, 'the course

* 6 Robinson, 183; affirmed on appeal by the Lords Commissioners, Id Prefatory List.

in which he was steering *would* have carried him directly to Havre, and that he should have continued in that course, *though not into the port of Havre*, but that he should have gone close under the land, and have taken a pilot for Caen.' Here, then, we perceive the same intention, and in the course of being pursued to the same illegal effect. *How can this intention be considered as innocent?* It is impossible that any blockade can be maintained if such a practice is allowed; that a vessel, under a destination to a port not interdicted, shall be at liberty to pursue her course in such a manner as must draw the cruiser employed in that service under the range of the enemy's batteries. It is at all times a matter of regret that the property of innocent persons should be exposed to hazard by the mere imprudence of their master; but it is impossible to relax the principle that the employer is legally affected by the acts of his agent. I am of opinion that the master in this case had declared an unlawful purpose, and was employed in pursuing it to an unlawful act; and that the ship and cargo must be pronounced subject to condemnation."

The question in neither of these cases was as to the *de facto* innocence of intention. Conceding that it might in each case in fact have been innocent, the court condemned the vessel because the policy of the law of war required it. They were condemned by force of the rule which Lord Stowell, in another case,* thus states in his own clear diction:

"If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; and if a vessel could, under a pretence of going further, approach, *cy pres*, close up to the blockaded port, so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence to hold, as a presumption *de jure*, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intention, it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of this right of war."

* The Neutralitet, 6 Robinson, 31

In *The Arthur*,* decided in 1810, this rule was again enforced to the condemnation of both vessel and cargo. That American vessel was captured in the Ems, which the master had entered, as he alleged, for the purpose of procuring a pilot to the Yadhe.

On the authority of these cases, we affirm that it was the duty of the Cornelius to pursue that course of conduct which, under the existing circumstances, was natural for her to pursue, and which the presence of the blockading vessel rendered possible and easy—namely, to request assistance from the Restless, a man-of-war of her own country, who was not only present on the spot, but was actually in pursuit of her. We affirm, further, that it was the personal moral duty of every man on board of her, which he disregarded at the peril of heavy liability under the criminal law of the United States—for infringement of this blockade by any one owing allegiance to the United States is no less an offence than high treason—to keep as far away from the coast of South Carolina, and as near as he could, if the vessel needed assistance, to the blockading fleet; and, finally, we say that this court is entitled, in view of the conduct of this master, to presume, *de jure*, that he intended to violate the blockade.

3. Conceding that, under the circumstances of this case, there is no such absolute presumption of guilty intention, as we contend there is, under the English authorities, from the conduct of the vessel as described, then we affirm that the whole of the nautical evidence in the case disproves the innocence of the master's intention. The facts appear in the case as the reporter states it. We are willing that the court decide the question upon them alone. Our argument will stand as their reserve.

Mr. Gillet, *contra*, contended: That the decisions below were the very matters brought here for review, and that they were brought here in the exercise of an unquestionable right; that to give to them the effect sought would be the

* Edwards, 208.

objectio ejus cujus dissolutio petitur, the begging of the case, and render all appeal useless.

That the principles of the English admiralty, to the extent asserted by Mr. Ashton, had never been adopted here; that it would be unwise to adopt them; that they originated in the former character of Great Britain, that of a frequent belligerent, and for some years a constant one; and that it would be impolitic that a nation like ours, whose true interests were those of a neutral—the interests of peace and commerce—should ever embrace them.

That, finally, on the facts the case was not with the captors, for that there was really no proof at all of bad intention; that, however the case might be, if Port Royal had not been open to trade, the fact that it was open, and opened by the government, who thus *invited* all persons to trade to it, changed wholly the case. Persons could hardly trade to Port Royal, where the government urged them to go, and not sometimes pass close to the blockading squadron; and it would be very unjust to make parties suffer for being thus found there. The mate's denial, Mr. Gillet argued, was as explicit as possible; not marked by any evasion or ambiguity, and should have conclusive weight in a case so obviously special.

Mr. Justice MILLER delivered the opinion of the court.

Notwithstanding the denial of the master, Vandyke, and the other claimants, of any intention to violate the blockade, we are of opinion that the vessel sailed from Port Royal with such intent, by running into Bull's Bay; from which Charleston was easily accessible.

1. There are strong reasons to believe that the vessel was started from New York on a simulated voyage to Port Royal, with intent to run the blockade before reaching that place.

The supercargo is stated to have been found in New York after a recent residence and travel through a large part of the insurrectionary region. Of Vandyke, the controller of the whole cargo, and owner of part of it, and charterer of

the vessel, nothing is known as to his residence, his place of business, his character or standing in reference to the government and the rebellion, or where he was, from the time the vessel left New York, June 15th, until his sudden appearance at Port Royal, October 8th. And although the case was open for further proof, and Vandyke makes the test oath to his own claim, we are still left in the dark as to these particulars. The vessel passed Bull's Bay on her voyage to Port Royal in the night, and stood off and on all night until daylight next morning, being fired at twice by the Restless, one shell reaching the schooner, and only leaving when daylight and the shells of the Restless made it necessary. The steward, Sanford, in his deposition taken *in preparatorio*, says that ten or fifteen minutes before the vessel ran aground, the master told him that he had intended to run the blockade from the first.

2. The circumstances which prove the intent to violate the blockade in the return voyage are still stronger.

Her voyage was again timed so as to reach the entrance to Bull's Bay in the night, but owing to her leaking condition it was about daylight when she came in sight of the blockading force. About that time she passed the Restless, was fired at from that vessel several times, paid no attention to the fire except to put on more sail, was pursued by the boats of the Restless, and was run aground and captured five or six miles inside her station. The excuse set up by the master for this conduct, is his desire to beach his vessel and save her and her cargo, because she was in a sinking condition. It is shown by the testimony of the master himself, that he had her bottom examined, and knew its condition before he left Port Royal. It can hardly be believed from his own statement on that subject, that he intended to risk her for the full voyage to New York when he started. Again, his obvious duty, and his safest course every way, was to approach the Restless, explain his condition, and ask for assistance. This duty he avoided, though he had full knowledge of the blockade, and when admonished by the shot from the Restless, he made every effort to escape by

crowding sail and running in toward the blockaded port. The excuse set up of a desire to save his vessel and cargo without subjecting her to salvage, would not be sufficient if the case stood alone on the facts connected with her voyage from Port Royal. In the language of Sir William Scott, in *The Charlotte Christine*,* although "it is a possible thing that his intention was innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intention." But when these are considered in connection with the facts already stated, tending to show an intention to run the blockade from the inception of the adventure, we entertain no reasonable doubt of the guilty purpose which carried her into Bull's Bay at the time of capture. Of course the attempt to violate the blockade was made in the interest of the cargo.

DECREE AFFIRMED.

THE CONVOY'S WHEAT.

1. Where a bill of lading, signed by a master, shows that a voyage to a particular place named on it is but part of a longer transit which it is understood is to be made by the cargo shipped, and that the cargo is to be carried forward in a continuous way on its further voyage, the master must be presumed to have contracted in reference to the course of trade connected with getting the cargo forward.
2. In such a case, if any obstacle should intervene, which by the regular course of the trade is liable to occur and for a short time retard the forwarding, the master cannot, from a mere inability to find storage at the *entrepôt*, turn about, and taking the cargo to some near port, store it there, inform the consignees, and clear out. He should wait.
3. If there is easy telegraphic communication with the consignees, he should notify to them his difficulty, that they may send him, if they please, instructions.

WOLCOT, as agent of certain persons, shipped on board the schooner Convoy, at Chicago, several thousand bushels

* 6 Robinson, 101.

of wheat. The *master* executed a bill of lading for it, which ran thus:

"Shipped in good order, &c., &c., to be delivered unto consignee, as *per margin*. Freight and charges to be paid as noted below, upon the *actual* and *complete* delivery of the said goods and freight to said *consignee*, or their assigns."

On the margin below was entered:

"Acct. Carrington & Preston, *Oswego, N. Y., via* Welland Railway from Port *Colbourne* to Port Dalhousie, *thence* by sail or steam to Oswego. *Freight to Port Colbourne, 8½ cents per bushel.*"

The reader will understand, of course, that the wheat was to be carried by the Convoy from Chicago, by the lakes, to Port Colbourne, at the eastern extremity of Lake Erie; that there it was to be unladed, and carried by the Welland Railway across the Canadian isthmus to Port Dalhousie, on

Lake Ontario; there to be *re*-shipped on a second vessel, and carried along Lake Ontario to Oswego, on the eastern part of the lake. The Convoy was too large a vessel to pass through the Welland *Canal*.

Parol testimony from Wolcot, the agent of the shippers, went to show, specifically, that the contract made by the master of the Convoy had been to carry the wheat to Port Colbourne only; and that he, Wolcot, had made a separate contract with the *Welland Railway Company* "to take it from there through to Oswego." The vessel agent at Chicago, one Goodenow, who filled the blanks in the Convoy's bills of lading and made the entries on the margin, testified to a similar effect; he swearing, moreover, that the expression, "*via* Welland Railway," entered on the margin, was construed by him as having the same meaning as "*care of* the Welland Railway."

The Convoy having arrived at Port Colbourne on the 29th of August, 1860, the master reported her to the Welland Railway Company, and informed the agents having charge of the railway and the elevator there that he was ready to discharge his cargo. There were then thirteen vessels in the port with cargoes to discharge, which had arrived before the Convoy; and the agents replied that they would discharge the Convoy's cargo in its turn. The master made a similar application on the morning of the 30th of August, and received answer as on the morning previous. There being no elevator but the one at Port Colbourne, and no warehouse or place where the wheat could be stored, the Convoy left Port Colbourne on the 30th of August, and went to the city of *Buffalo, the nearest port to Port Colbourne.* On the 31st of August she discharged her cargo in *that city*, and the master stored it at the Hatch elevator there, taking a receipt for its delivery to his order. On the next day, which was Sunday, *he* sailed for Chicago; and the owner of the Convoy telegraphed thus from Buffalo to Carrington & Preston, the consignees at Oswego:

"Obliged to store cargo Convoy in the Hatch elevator, in this city; shall libel cargo for freight and demurrage at Port Colbourne, and freights and charges here, unless settled immediately."

This telegram was the first and only information sent to

the consignees relative to the cargo. *There was a telegraphic communication between Port Colbourne and Oswego.*

Carrington & Preston, feeling themselves aggrieved by proceedings which they regarded as somewhat summary, declined to settle the account so immediately as invited; and the ship-owner libelled the wheat in the District Court for the Northern District of New York, for freight and damages, in the nature of demurrage.

It appeared that if the Convoy had remained at Port Colbourne she would have been unladed on the 4th of September, in her regular order; that the railway company did everything in their power to despatch business, and discharged cargoes as fast as the capacity of their elevator and road would permit; and that, at this time, an unusual number of vessels had arrived, and that there was an unusual amount of grain to be handled on the road and at the elevator.

The District Court dismissed the libel. The Circuit Court affirmed its decree. Appeal here.

Mr. Hibbard, for the appellants, owners of the Convoy: By the entries on the *margin* of the bill of lading, taken in connection with Goodenow's explanation of the word *via*, with the circumstances of the case, and especially the size of the vessel, which could not pass through the Welland Canal, it appears that the contract was to carry to Port Colbourne, and that there the ship-owner should be entitled to receive freight. The freight was to be paid when the *vessel's* delivery was "actual and complete" *at Port Colbourne.*

The ship-owner did all he could to perform his contract. It was the duty of the owner of the cargo to provide means at the port of delivery for unlading the cargo. The owner of the cargo not providing these means, the ship-owner was right in delivering his cargo at the nearest practical commercial point, which was Buffalo. He was not bound to wait for days, to his great detriment, and look to the possibility of recovering his damages of the shipper, or ultimate consignee, while that owner or consignee was continually

guilty of breaking his contract by not providing means for unlading the vessel.

In *Clendaniel* v. *Tuckerman*,* a New York case, it was held that it is the duty of a consignee to receive; that he must do this within a reasonable time; that his duty and responsibility in this respect is the same, after a reasonable time has elapsed, as in the case where lay days and demurrage are stipulated for in the bill of lading, and that after that reasonable time has elapsed the ship-owner may store the cargo elsewhere and recover his freight and damages.

Our conduct here was quite according to this case, which holds, further, that it is the duty of the carrier, under such circumstances, to store the goods in some place of safety, retaining his lien for his freight, &c.

Suppose it had appeared that the property could have been delivered at another dock? Would not the ship-owner have had a right to deliver there and to claim freight? Beyond question. The different ports around the Western lakes are really, in principle, other docks, as to Western produce seeking its market on the seaboard.

Nor was it necessary that the master should have telegraphed to Oswego. There is no proof of any custom to do so. The carrier's business was to perform his contract according to law. He did so perform it here. He was not bound to address the owners of the cargo, for the purpose of ascertaining whether they would make a new contract. Why require notice to a man whose business it was to be at the port, and there absolve himself from his responsibilities to receive the cargo? Besides, the case shows, in effect, that nothing could be done with the property at Port Colbourne. There was but one elevator there, and that was full. The law will not require a futile notice. The doctrine in relation to notice only applies where the owner or consignee is at the port, and can in some way take possession of the property.

To say that the master knew about the place, and should

* 17 Barbour's Supreme Court, 184.

have provided against delay by special contract, begs the question. The shipper also knew about the place. It was his duty to see that the property was received, and if he desired to qualify that duty, he should have provided for it in the contract.

Mr. Ganson, contra, for the consignees.

Mr. Justice MILLER delivered the opinion of the court.

It is not necessary to determine whether the libellant in this case, who was owner of the ship, contracted to deliver the wheat to the consignees at Oswego, or whether he contracted to deliver it at Port Colbourne. The bill of lading given by the master of the vessel, shows that it was understood that from Chicago to Port Colbourne was only part of the voyage which the wheat was to make, and that from Port Colbourne it was to be forwarded by the Welland Railway on its further voyage.

The testimony is clear, that at Port Colbourne there is an elevator belonging to that railroad company, and that it is the only one; and that there is no other warehouse or receptacle in which the wheat could be stored. The course of the trade demands that wheat shipped to Port Colbourne must go through that elevator, and if the vessels making delivery are so numerous that it cannot relieve them promptly, they must await their turn. The master of the vessel must be held to have made his contract with a full knowledge of this course of trade, and be governed by it. He had, therefore, no right, when he found there would be a delay of several days in delivering his cargo at the elevator, to carry it to Buffalo at the expense of the owner.

There is another matter in which the master failed in his duty. There was a telegraphic line in operation between Port Colbourne and Oswego, where the consignees resided, and he could, at any time during the three days he lay at Port Colbourne, have notified them of his difficulty, and received their instructions. He did nothing of the kind; but, after waiting about half the time that would have been

Statement of the case.

required to enable him to discharge his cargo, he sailed to Buffalo, deposited the wheat there, subject to his own order, and then notified consignees by telegraph that he should libel it for freight and damage, unless paid immediately.

DECREE AFFIRMED, WITH COSTS.

THE CHESHIRE.

1. The property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize though some of the partners may have a neutral domicile.
2. The approach of a vessel to the mouth of a blockaded port for inquiry—the blockade having been generally known—is itself a breach of the blockade, and subjects both vessel and cargo to condemnation.

DURING the Southern rebellion, and our proclamation of a blockade of Savannah and other parts of the Southern coast being then notorious to the world, the ship Cheshire, with a miscellaneous and assorted cargo, was captured by a war steamer of the United States, on the 6th of December, 1861, off Savannah bar, eight or nine miles eastward of Tybee Light. She was taken to the port of New York and there libelled in the District Court as prize of war.

The evidence showed that the ship had been built in the State of Maine in 1848, her American name having been the Monterey; that she was owned by a house residing and doing business in Savannah, and was employed in the cotton trade to Liverpool; that in May, 1861, after the port of Savannah had been closed by the blockade set on foot under the President's proclamation of April 19, 1861, that house made a sale of her to Joseph Battersby, of *Manchester*, England; that her name was then changed, and in June, 1861, that she broke the blockade of Savannah, carrying a cargo of cotton to Liverpool.

Joseph Battersby, the purchaser, and who claimed her

here, was then and at the time of the capture, a partner in business with William Battersby in *Savannah*, where one of them resided, the name of the firm being the same as that of their Manchester house, William Battersby & Co.

The *cargo* was claimed by both the Battersbys.

The ship was loaded at Liverpool and sailed directly for Savannah. The captain, however, had received instructions at Liverpool, dated October 8, 1861, "to call off Savannah *merely for the purpose of inquiry*, but on *no account whatever* to attempt to enter a blockaded port." "In case the blockade is not raised proceed to *Nassau*, N. P., and *remain until you receive orders from Messrs. William Battersby & Co., of Savannah.*" The claim made in the case stated that this contingent destination to Savannah had been made in consequence of confident predictions, well known, by high officers of our government, that the rebellion would speedily be quelled; and of the consequent presumption by the owners of the vessel and cargo, that the blockade would probably be raised by the time the vessel reached our Southern coast.

Some of the papers showed that Halifax, N. S., was a possible port of destination. The shipping articles represented the voyage as "from Liverpool to Halifax, N. S., or Nassau, N. P.," &c. The receipt of the shipping-master of the port of Liverpool for fees, dated 30th of September, 1861, declared it for Halifax. The master swore: "On the voyage during which we were captured, the Cheshire was bound from Liverpool to Halifax, Nova Scotia, or Nassau. I was to speak the blockading squadron, and *if the ports were blockaded*, I was to go to Nassau, or Halifax."

None of the papers of the ship, neither the clearance, bills of lading, invoices, nor manifest, which declared the ship bound for Nassau, nor the shipping articles, which declared her bound for Halifax or Nassau, contained the slightest intimation of a purpose under any circumstances to enter the port of Savannah.

The District Court, after argument and full consideration, condemned both vessel and cargo, on the ground that they were enemy's property and were captured in attempting to

break the blockade of the port of Savannah. On appeal to the Circuit Court the condemnation was affirmed, and the case was now brought by the claimants before this court for review.

Mr. Edwards, for the claimants, appellants in the case; Mr. Assistant Attorney-General Ashton, and Mr. Coffey, special counsel, contra.

Mr. Justice FIELD delivered the opinion of the court.

The facts established by the evidence in this case justify the condemnation, we think, of the cargo as enemy's property. No principle is more firmly settled than that the property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize without regard to the domicile of the partners. The trade of a house of this kind is essentially a hostile trade, and the property employed in its prosecution is therefore treated as enemy's property, though some of the partners may have a neutral domicile.* Such trade tends directly to add to the resources and revenues of the enemy, and, as observed by Mr. Justice Story, "there is no reason why he who thus enjoys the protection and benefits of the enemy's country should not, in reference to such a trade, share its dangers and losses. It would be too much to hold him entitled, by a mere neutral residence, to carry on a substantially hostile commerce, and at the same time possess all the advantages of a neutral character."†

In this view it is unimportant whether the cargo was to be delivered to agents at Nassau, subject to the order of the house at Savannah, or be delivered directly from the Cheshire in the port of Savannah. In either case there was the trade with the house situated in the enemy's country.

The evidence in the case also establishes, we think, with equal clearness, the fact that the ship was attempting to break the blockade when captured. She was loaded for

* The Friendschaft, 4 Wheaton, 107.

† The San Jose Indiano and Cargo, 2 Gallison, 284.

Savannah; her cargo was intended for the branch-house of the shippers; she sailed directly for that port; the owners and officers of the ship were informed of the existence of the blockade before leaving Liverpool; and there was no act of our government, nor any act of the British government, nor had any event occurred in the progress of the war, from which any inference could be drawn that the blockade had ceased. The instructions to call off Savannah merely for the purpose of inquiry, and to proceed thence to Nassau upon ascertaining that the blockade was in force, have, under these circumstances, the appearance of a device to cover up a settled purpose to elude the blockade. They create a strong impression to that effect, and this impression is strengthened by an examination of the ship's papers. These papers contain no intimation of an intention to enter the port of Savannah upon any contingency. They show the destination of the ship to be either Nassau or Halifax; they indicate no contingent intention of going anywhere else. This concealment of the truth is itself a circumstance calculated to awaken strong suspicion as to the real designs of the ship; it is, in fact, *prima facie* evidence of fraudulent intention.

In the case of *The Carolina*,* where a cargo was taken on a voyage from Bayonne, ostensibly to Altona, but, in fact, to Ostend, the ship's papers represented that the cargo was to be delivered at Altona and Hamburgh; and the court said, that if there had been any fair contingent, deliberative intention of going to Ostend, that ought to have appeared on the bills of lading; for it ought not to be an absolute destination to Hamburgh if it was at all a question whether the ship might not go to Ostend, a port of the enemy, and that there was in this a fraudulent concealment of an important circumstance which ought to have been disclosed. Of the same purport are all the authorities.†

* 3 Robinson, 75.

† See The Margaretta Charlotte, Id. 78, note 1; The America, Id. 86; The Neptunus, Id. 80; The Nancy, Id. 82; The Phœnix, Id. 186.

Opinion of the court.

Aside from these considerations the intention to break the blockade is to be presumed from the position of the ship when captured. As already stated, she knew of the blockade when she sailed from Liverpool; she had no just reason to suppose it had been discontinued; her approach, under these circumstances, to the mouth of the blockaded port for inquiry was itself a breach of the blockade, and subjected both vessel and cargo to seizure and condemnation. The rule on this point is well settled, and is founded in obvious reasons of policy. If approach for inquiry were permissible it will be readily seen that the greatest facilities would be afforded to elude the blockade; the liberty of inquiry would be a license to attempt to enter the blockaded port; and that information was sought would be the plea in every case of seizure. With a liberty of this kind the difficulty of enforcing an efficient blockade would be greatly augmented. If information be honestly desired, it must be sought from other quarters. In the case of the *James Cooke*,* the ship was captured at the entrance of the Texel, and the court applied this rule, observing that the approach of the ship to the mouth of a blockaded port, even to make inquiry, was, *in itself*, a consummation of the offence, and amounted to an actual breach of the blockade.

In every view, therefore, in which this case can be considered, we are of opinion that the ship and cargo were rightly condemned; and we, therefore, affirm the

DECREE OF CONDEMNATION.

[See, as to the second point of this case—inquiry at a blockaded port—*supra*, p. 84, *The Josephine*.—REP.]

* Edwards, 263.

TERRITORY v. LOCKWOOD.

A proceeding in the nature of a *Quo Warranto*, in one of the Territories of the United States, to test the right of a person to exercise the functions of a judge of a Supreme Court of the Territory, must be in the name of the United States, and not in the name of the Territory. If taken in the name of the Territory the error may be taken advantage of on demurrer, and it is fatal.

THE act of Congress organizing the Territory of Nebraska ordains that the executive power in and over *the* Territory shall be vested in a governor; that the legislative power shall be vested in a governor and legislative assembly; and that the judicial power of the Territory shall be vested in a Supreme Court, &c. And the Code of the Territorial legislature* gives the remedy of information against "any person unlawfully holding or exercising *any* public office or franchise *within this Territory;*" providing, also, that the defendant shall "answer such petition in the *usual way;* and, issue being joined, it shall be tried in the *ordinary* manner."

With these provisions in force, the district attorney filed in one of the District Courts of Nebraska Territory an information in the nature of a *Quo Warranto* in the name of the "*Territory of Nebraska*, on the relation of Eleazar Wakely," against a certain Lockwood, to test the rights of the said Lockwood to exercise the office of an associate judge of the Supreme Court of the Territory; a court in which, as is known, the judges are appointed by the President of the United States. The information was full, explicit, and technical in its statement of the case; alleging, with circumstance, that the relator had a right to the office, and that the defendant held, exercised, usurped, and invaded, &c., without any legal warrant, &c. The defendant demurred generally. The District Court sustained the demurrer, and gave judgment in his favor. The relator took the case to the Supreme Court of the Territory, where the judgment below was affirmed. This was a writ of error to reverse that judgment

* 10 Stat. at Large, 277.

Argument for the relator.

The question presented for the determination of this court was, whether the petition was well brought in the name of the *Territory*, or whether it should not have been in behalf of the United States.

Mr. Woolworth for the Territory and relator, plaintiff in error: The language of the Code, "*any* public office," plainly embraces the office of a Territorial judge. Not only does such an officer hold an office "within the Territory," but the whole of the judicial power of the Territory is vested in him and his associates. He is an officer of the Territory. His duties are all performed within it and concerns its people. The expression of the organic act that "the judicial power of *the* Territory" shall be vested, &c., indicates that the powers belong to the Territory in its very nature; that is to say, that they are inherent in it as a political entity. The Territory is made the sole governing power within its limits, so far as its domestic affairs are concerned. All laws, we know, are enacted, and all judicial proceedings conducted in its name. The usurper of one of its offices is an offender against *its* dignity. The people of *it* suffer by the act of usurpation. It is unimportant how either the relator or the defendant claims; whether by appointment of the president, the governor, or by election from the people. Each, in either or any case, is equally within the spirit of the Code and organic act.

Territorial courts are not constitutional courts in which the judicial powers conferred by the Constitution on the General Government can be deposited. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make laws regulating the territories belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the exercise of its powers over the Territories of the United States.*

* American Insurance Company v. Canter, 1 Peters, 546.

Opinion of the court.

The Code does not contemplate a demurrer. It declares, on the contrary, that the defendant shall "answer." But, however this may be, the demurrer is but general. The defendant thus admits himself to be an intruder into a judicial office, and rests upon the pretence that no cause of action is shown by the information, though that information sets forth the relator's right to the office and his unwarrantable exclusion from it by the defendant in as full, clear, direct, and formal terms as are employed in any precedent to be found in any book of Entries whatever. In such a case an objection purely technical, as this is, an objection, to wit, that the name of the United States, and not that of the Territory, should be used, will be listened to with disfavor.

Lockwood, propriâ personâ, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The writ of *Quo Warranto* was a common law writ. In the course of time it was superseded by the speedier remedy of an Information in the same nature.* It was a writ of right for the king.† In the English courts an information for an offence differs from an indictment, chiefly in the fact that it is presented by the law officer of the crown without the intervention of a grand jury.‡ Whether filed by the attorney-general or the master of the crown office, and whether it relates to public offences or to the class of private rights specified in the statute of 9 Ann. ch. 20, in relation to which it may be invoked as a remedy, it is brought in the name of the king, and the practice is substantially the same in all cases.§ Any defect in the structure of the information may be taken advantage of by demurrer.‖

* 5 Bacon's Abridgment, 174, Tit. Information A; 3 Blackstone's Commentaries, 263.

† 7 Comyn's Digest, p. 190, Phila. ed., 1826; Tit. *Quo War.* A.

‡ 2 Hawkins' P. C., chap. 26, § 4.

§ Cole on Informations, 65, 113; Rex v. Francis, 2 Term, 484; 4 Blackstone's Commentaries, 312.

‖ Regina v. Smith, 2 Moody & Robinson, 109; Regina v. Law, Id. 197.

In this country the proceeding is conducted in the name of the State or of the people, according to the local form in indictments, and a departure from this form is a substantial and fatal defect.*

In *Wallace* v. *Anderson*,† this court said, "that a writ of *Quo Warranto* could not be maintained except at the instance of the government; and as this writ was issued by a private individual, without the authority of the government, it could not be sustained, whatever might be the right of the prosecutor or the person claiming to exercise the office in question." In the case of the *Miners' Bank* v. *United States*,‡ on the relation of Grant, the information was filed in the name of the United States in the District Court of Iowa Territory. The sufficiency of the information in this respect does not appear to have been questioned. A State court cannot issue a writ of mandamus to an officer of the United States. "His conduct can only be controlled by the power that created him."§ The validity of a patent for land issued by the United States "is a question exclusively between the sovereignty making the grant and the grantee."‖

The judges of the Supreme Court of the Territory of Nebraska are appointed by the President and confirmed by the Senate of the United States. The people of the Territory have no agency in appointing them and no power to remove them. The Territorial legislature cannot prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and conviction by them would be futile as to removal. The right of the Territory to prosecute such an information as this would carry with it the power of a motion without the consent of the government from which the appointment was derived. This the Territory can no more accomplish in one

* Wright v. Allen, 2 Texas, 158; Wright v. The People, &c., 15 Illinois, 417; Donnelly v. The People, &c., 11 Id. 552; Eaton v. The State, 7 Blackford, 65; Comm. v. Lex & H. T. Co., 6 B. Monroe, 398.

† 5 Wheaton, 292.

‡ 5 Howard, 218.

§ McClung v. Silliman, 6 Wheaton, 605.

‖ Field v. Seabury et al., 19 Howard, 382.

way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of the States as to the Federal officers whose duties are to be discharged within their respective limits. The right to institute such proceedings is inherently in the Government of the nation. We do not find that it has been delegated to the Territory. We think the demurrer was well taken.

JUDGMENT AFFIRMED WITH COSTS.

THE CITY v. BABCOCK.

1. Courts sitting in error will not discuss questions not raised by the record before them.
2. Where a party has a verdict given against him on insufficient evidence, his remedy is by motion for new trial. He has no remedy in a court of error.

AMONG the festal anniversaries of the city of Providence, R. I., is that known as "Commencement Day." Upon this occasion Brown University gives its degrees; and citizens and strangers throng the town. Upon the anniversary of 1859, Miss Babcock, of Connecticut, visited Providence and was participating in the spectacle. A procession was passing through one of the streets in a central part of the city, and Miss Babcock, who was walking in the same street, then filled with people, fell through an opening in the pavement which gave entrance into a cellar below, whereby she was severely injured.

A statute of Rhode Island imposes upon all cities within its bounds an obligation to keep their ways "*safe and convenient* for travellers;" and the office of the *mayor of the city having*, as was proved, *been on the very street where the accident happened, and almost directly opposite to the place of its occurrence*, Miss Babcock brought suit against the city in the Circuit Court for Rhode Island, to recover damages for the injury she had suffered.

On the trial, the city offered evidence tending to prove that the alleged defect in the street was an opening in the sidewalk adjoining a storehouse, extending fifteen inches from the side of the building, four feet long, and covered with a substantial door, upon hinges, near the building, and which, when raised, left an opening to the cellar of fifteen inches wide outside of the curbstone; in other words, that it was an ordinary vault entrance; a trap-door to a cellar below. The entrance, it appeared, had been used for the purpose of business for a long period of time—say forty years; the street, in fact, having been laid out in 1829, and the opening used as an entrance to the cellar before that time. The occupants of the store testified that the opening was used to let in and take out goods from the cellar of the store, and for this purpose that the lid was raised whenever they had occasion to raise it in their daily business; more or less every business day in the year; that they intended to keep it closed when not opened for such use, but they could not say that it was always so kept.

Complaints, it appeared, had been made to the *occupants of the store* that the opening was unsafe.

It did not appear who opened the trap next before the accident; but no one was engaged on that day, in taking in goods or taking them out, and no one was in the cellar when the plaintiff fell through the opening. One of the occupants of the store testified that the opening *had not been open more than six minutes before the occurrence of the accident.*

"*Much other testimony,*" the bill of exceptions went on to say, "*was also introduced, on the one side and the other, which is not reported.*"

The court charged that the plaintiff must prove—

1st. That the way described was a street which the city was bound by law to keep in repair.

2d. That it was defective on the day of the injury.

3d. *That the city had notice of the defect.*

4th. That the plaintiff was travelling with ordinary care.

5th. That the plaintiff was injured.

6th. That the injury was occasioned solely by the defect

in the street, and not from want of ordinary care on the plaintiff's part.

The defendant then, invoking the benefit of the testimony already above stated, requested the court to instruct the jury thus:

The defendant *offered evidence tending* to prove that the defect in the street in question was an opening in the sidewalk adjoining a storehouse extending fifteen inches from the side of the building, four feet long, and covered with a substantial cover, upon hinges, near the building, and which, when raised, left an opening to the cellar of fifteen inches in width; that the sidewalk was six feet in width outside of the curbstone; that the entrance had been used for the purposes of business prior to the time when the highway was laid out over the land adjoining the building and including this sidewalk; that the cellar-way had been used by the occupants of the store for more than forty years, for the purpose of taking in and putting out merchandise in the course of their business, being opened for that purpose as required during the periods of actual use; that on the occasion of the accident the door covering the opening had been raised for use by the occupants of the store but six or eight minutes; that no complaint had been made to the occupants of the store, or to the city authorities, of this mode of use, though this street was one of the great avenues for pedestrians in the city of Providence.

And thereupon asked the court further thus to charge:

The owners of the store had the right so to use this opening in the sidewalk for the purposes of actual business; that it was not negligence on the part of the city to allow such an opening, so protected and used, to be continued, *and that upon the evidence the city had no notice that the highway was unsafe or inconvenient by the opening of the cellar door and keeping it open for use during the period testified to.*

But the court refused so to charge; and the jury having found for the plaintiff $3300, the correctness of such refusal was now the question here.

Mr. Jenckes, for the city, plaintiff in error: The evidence was that the lid had not been open for more than six minutes

before the accident occurred. It was impossible that the *city* could have either notice or knowledge of its being open. Constructive notice cannot be set up. Actual notice is not pretended. If the city had had notice, they were not bound to shut the trap if the owners were using it in the ordinary and long and safely practised course of their business. Undeniably the owners of the store had a right to have such a cellar as they had, and to have in it also such an entrance as was there. Such modes of access to cellars exist in every city, and this entrance had existed where it did for half a century. The same owners had as plain a right to raise the covering of the cellar for the purpose of actual business, and to keep it open while they were engaged in so using it.* When they were thus using it, both the public and the owners of the storehouse enjoyed their rights without conflict, and the aperture would not become a defect in the highway.

The statement of the bill of exceptions that "much other testimony was also introduced on the one side and on the other, which is not reported," means, obviously, that much *irrelative* testimony was so introduced; much testimony which did not bear on the case. Under these circumstances, the case is that of a suit brought, not against the owner of the property where the vault was, and who might be liable, without notice of danger, but against the city, which cannot be liable unless it *have notice*, by a person who has fallen through the trap-door of an ordinary city vault, such a vault as the owner of the store had a clear right to have and to use, *which trap-door was not open more than six minutes before the accident happened.*

Upon such a case the court should have charged, as we asked it to do, that the city had *no notice* that the street was unsafe or inconvenient. The consequence of the omission of the court thus to charge was that the jury misconceived the law and gave the erroneous as well as heavy verdict which they did.

* O'Linda v. Lothrop, 21 Pickering, 292; Underwood v. Carney, 1 Cushing, 285.

After argument by *Mr. Potter*, for the defendant in error, Mr. Justice DAVIS delivered the opinion of the court.

It is argued by the plaintiff in error that the defect in the street was so recent that the city could not be deemed to have constructive notice; and, as no actual notice was proved, no liability could attach. But, as this question is not presented by the record, we are not called upon to discuss it, and to declare under what circumstances the city could be exonerated from liability for damages by reason of defective sidewalks. The bill of exceptions does not purport to contain all the evidence on the trial, nor even the substance of it, for it says, after reciting certain proofs, "that much other testimony was also introduced on the one side and the other which is not reported."

Such being the case, the correctness of the finding of the jury is not involved, and every presumption is in favor of the verdict, and that it was supported by the evidence on the trial. There was evidence which *tended* to establish the liability of the city, and the court properly charged the jury that the plaintiff, to maintain her action, must prove that the city had notice of the defect in the street. If the evidence were not enough, the corrective was in the hands of the court, on a motion for a new trial. It was conceded, in the argument, that the court ruled properly in the instructions which were given to the jury; but it was insisted that there was error in refusing to instruct, as requested by the defendant. The court was asked, substantially, to charge the jury, that the city was not responsible, because there was evidence which *tended* to prove the existence of certain facts. This the court had no right to do. The court could not tell the jury that *any* legal results followed from evidence which only *tended* to prove the issue to be tried. This controversy necessarily turned on the finding of the jury upon the evidence, and an instruction, which sought to withdraw from the jury the right to determine matters of fact, was correctly refused.

JUDGMENT AFFIRMED.

BLANCHARD v. BROWN.

In Illinois, and under its statutes relating to ejectment, when a question of fraud in obtaining a title to real estate has been submitted, in a suit in ejectment, to a jury, and determined against the party setting it up, such party, notwithstanding the nature of the action, cannot go into equity and ask relief there, setting up essentially the same frauds, and sustaining them by the same evidence that he relied on to make out his case in the suit in ejectment at law.

The doctrine of *Miles* v. *Caldwell* (2 Wallace, 35), a case from Missouri, giving the same conclusive effect to a verdict and judgment in ejectment as to verdicts in other actions—the form of the ejectment not being fictitious—held applicable in Illinois, and under its statutes.

VARIOUS judgments had been given against a debtor in Chicago owning real estate there; among them one in favor of Lyman. Execution issued in April, 1847, and on it, in April, 1848, the premises were sold to *Blanchard*.

A certain Hart had also obtained judgment against the same party. Execution issued in 1845; but was not returned into the clerk's office until 1852. The execution, it seemed, recited a judgment of the Cook County Court of *Common Pleas;* a court not at the time in existence; that court having been created by act of legislature only in 1848; and the name of the court in which the judgment was really given,—to wit, the "Cook County Court,"—having in that act been changed to it. An *alias* was subsequently issued on the same judgment, and the land sold for $71 to *Brown;* its actual value, at the time, being about $2000, or, as was alleged, even $4000.

Blanchard being in possession, Brown brought ejectment against him. Both parties, of course, claimed under the same judgment debtor, and by virtue of their respective judgments and execution sales; the judgment under which Blanchard claimed being junior to the one on which Brown rested his title, and judgments being liens in Illinois according to their priority. Blanchard set up, as his ground of defence on this ejectment, that the sale under the judgment in favor of Hart, and under which Brown sought to dispossess

him, was a fraudulent sale, made to defeat subsequent encumbrancers, and, accordingly, that Brown had no title. To show the fraud, evidence was given of the value of the property compared with the price for which it sold; that it was sold in a body, instead of having been sold, as it might naturally and much more profitably have been, in a divided form; that false representations were made as to the encumbrances on it, the representations having been that it was largely encumbered when it was not so; that no proper notice of the sale had been given, the advertisement which gave the notice having announced only that the sale would be on a day named, "between 9 o'clock A.M. and sunset."

Blanchard set up, also, that irrespective of fraud (of which, indeed, the execution process was said to be one evidence), the sale was void for the irregularity in such process, and put in evidence the facts connected with this part of the proceeding.

The suit resulted in a verdict and judgment for Brown; and a second trial had the same termination. Blanchard, tendering the money paid by Brown and ten per cent. interest from the day of sale, now filed a bill in equity in the Circuit Court for the Northern District of Illinois, asking to have the estate upon equitable terms. Under his bill some new evidence—objected to as being in breach of professional confidence—was introduced; but with it all admitted, he made in effect the same attack on the judgment-title of Brown that he did in the previous actions of ejectment.

The Circuit Court dismissed the bill, and this court was now asked by Blanchard, appellant in the case, to reverse the decision.

It is here necessary to state, that in Illinois the old English form of ejectment does not prevail. Ejectment, like other actions, is brought by a real plaintiff against the party actually claiming; and is for the specific property demanded, with damages for its detention. A statute of the State, it should also be said, declares* "that every *judgment*

* Revised Laws of 1845, chap. xxxvi, § 89.

in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title established in such action upon the party against whom the same is rendered; and all persons claiming from, through, or under such party, by title accruing after the commencement of such action."

One defence, among others made to the bill and argued by *Mr. Fuller*, was that Blanchard now set up in his bill substantially what he had done in his ejectments, and that the case could not be distinguished from *Miles* v. *Caldwell*,* decided at the last term of the court; a case which, though from another State, Missouri, was obligatory, in the circumstances, in this case from Illinois. In the case cited, a statute of Missouri enacted that in ejectment, as in other actions, a judgment, except one of nonsuit, "shall be a bar to any other action between the same parties, or those claiming under them, as to the same subject-matter;" and this court held, that as ejectment was in Missouri an actual, as distinguished from a fictitious proceeding, a title decided in it could not be reviewed in chancery any more than any other matter tried and decided at law.

Mr. Hitchcock, for Blanchard, the appellant: The reply to what is argued by Mr. Fuller is twofold.

1st. The suit at law concerned only the *legal* title. This bill to redeem is based on an *equitable* one. The sheriff's sale was sufficient to pass the *legal* estate, and upon it the purchaser could maintain ejectment. It is altogether another question whether the sale was attended by such circumstances of fraud and irregularity as will induce a court of equity to relieve against its *legal* effect. The object of the action at law was to assert such paramount legal title. The object of this suit in chancery is to get rid of such title by redemption. A mortgagee may recover upon his fee at law, but he cannot assert such recovery as a bar to redemption in chancery. Fraud will avoid a deed at law only when it relates to the execution of it; but a recovery upon such a

* 2 Wallace, 35.

deed cannot be urged as a bar to a bill to compel the surrender and cancellation of it, for fraud in the consideration.*

A trustee may recover, in ejectment, against his *cestui que trust;* but such recovery would not bar proceedings in chancery to assert the equitable title. "A court of law may, indeed, investigate some questions of fraud, and, when proved, treat a deed as a nullity, and conveying no title; as where a party was induced to execute a deed supposing it was another paper; but, in general, it will not go behind the naked legal title and inquire where the equities are."†

The case of *Miles* v. *Caldwell*, cited by opposite counsel, establishes only the principle, which is not controverted, that a party cannot appeal from a judgment at law to a court of chancery upon the relative merits of the *legal titles* involved in the controversy at law. There, a court of law had passed upon the validity of a deed alleged to have been fraudulent as against creditors, a matter over which courts of law have always exercised jurisdiction.

There was in the present case no doubt about the power of the court to administer full relief. In Illinois, the distinction between courts of law and chancery is fully maintained, and matter which furnishes no defence at law may be good ground for relief in chancery.

2d. It has been expressly decided in that State that such irregularities cannot be taken advantage of, collaterally, in the action of ejectment.‡ And such is the general rule of law.

It is believed that no case can be found in which a sale has been successfully attacked, in *collateral* proceedings at law, upon similar grounds.

Mr. Justice DAVIS delivered the opinion of the court.

The common-law form of the action of ejectment does not

* Dorr v. Munsell, 13 Johnson, 430; Parker v. Parmele, 20 Id. 130; Stevens v. Judson, 4 Wendell, 471.

† Reece v. Allen, 5 Gilman, 241; decided in the State in which this case was tried.

‡ Swiggart et al. v. Harber et al., 4 Scammon, 375.

prevail in Illinois. There the action is without fictions, and is between the real parties in interest, and for the possession of a specific estate, and damages for its detention. On account of the fictitious character of the common-law action of ejectment, a judgment was not a complete bar, as in other actions. But in Illinois, by statute, it is declared, "that every judgment in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title established, in such action, upon the party against whom the same is rendered, and all persons claiming from, through, or under such party, by title accruing after the commencement of such action." One verdict alone was not deemed satisfactory by the legislature. The ancient reverence for the tenure by which lands are held had its influence, and the unsuccessful party, of *right*, is entitled to *one* new trial, and the court can, if satisfied that justice will thereby be promoted, grant a *second*. After this the litigation is ended, and the verdict and judgment have the same conclusive effect as in other actions. In Missouri, a judgment in ejectment is also a bar to any other action, between the same parties, on the same subject-matter; and this court, in the case of *Miles* v. *Caldwell*,* in construing a statute, no broader than the Illinois enactment, *held* that whatever is conclusive of the title to land in the courts of a State, is equally conclusive in the Federal courts; that it is, in fact, a rule of property. A perfect solution is, therefore, given to this case when it is ascertained what was tried and determined in the ejectment suit. The evidence on this point is so full as to leave no room for doubt.

Blanchard did not resist Brown's recovery in the action of ejectment on the sole question of paramount legal title, which he had the right to do, and then endeavor to get rid of it in chancery on the question of superior equities. He chose rather to risk his whole defence in the impeachment of Brown's title for fraud, and because the sale was vitiated by irregularities and the property sacrificed. Having failed

* 2 Wallace, 44.

before the jury, he is estopped from investigating the same matters in another jurisdiction. He waived his right to have the question of fraud litigated in a court of chancery, when he presented it, as a defence to the action at law. And the defence was legitimate and proper, for such questions of fraud and irregularity as were raised could be disposed of as well at law as in chancery.

A grossly inadequate price is, under some circumstances, evidence of fraud, and a fit subject of inquiry by a jury, in determining the validity of a sale made under legal process. If the sale on the Hart execution was not made for the purpose of satisfying the judgment, but fraudulently to defeat subsequent encumbrancers, and Brown was not a *bonâ fide* purchaser for value, then his title was bad; and it was equally bad, if the irregularities were such as to render the sale void.

Evidence was given on all these matters, and was never withdrawn from the consideration of the jury. In fact the whole record shows that Blanchard claims equitable relief on substantially the same grounds, and sustained by the same evidence that he relied on to defeat the action of ejectment. The decision in *Miles* v. *Caldwell* is, therefore, applicable. In that case, as in this, the question of fraud had been submitted to the jury, and determined against the complainant; and this court held that he was barred by the proceedings in ejectment, and could not raise anew in chancery the same questions that were heard at law.

DECREE AFFIRMED WITH COSTS.

DANIELS v. RAILROAD COMPANY.

Under the act of April 29, 1802 (§ 6), providing "that whenever *any question* shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, *the point* upon which the disagreement shall happen shall . . . be certified . . . to the Supreme Court, and shall by the said court be finally decided"—the court will not even by con-

Statement of the case.

sent of parties take jurisdiction, unless the certificate of division present in a precise form, a point of law upon a part of the case settled and stated. Hence where the record stated certain facts, and with this statement presented the testimony of numerous witnesses which was directed to the establishment of others,—the whole case being, in fact, brought up with a purpose, apparently, that this court should decide both fact and law—and the question certified was whether in point of law upon the facts as stated and *proved* the action could be maintained, —the court dismissed the case as not within its jurisdiction.

THE sixth section of the act of Congress of 29th April, 1802,* provides:

"That whenever *any question* shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, *the point* upon which the disagreement shall happen, shall, &c., be stated under the direction of the judges and certified . . . to the Supreme Court . . . and shall, by the said court, be finally decided."

With this act in force Daniels brought a suit in the Circuit Court for the Northern District of Illinois against the Rock Island Railway Company for injuries done him by a collision on its railroad; there being a special plea to one of the counts of the declaration—of which there were several, denied generally—that the collision referred to was brought about by the carelessness of the defendant's servant, and without the knowledge or consent of the defendant, and that at the time of the injury the plaintiff himself was a servant serving as a fireman on the locomotive. The record went on:

"On the trial it was proved that the defendant was a common carrier of passengers; that at the time alleged the plaintiff was on the engine of the defendant, for the purpose and *in the manner hereinafter stated*, proceeding over the road of the defendant, when by the negligence and carelessness of the engineer of the locomotive (the said engineer being at the time a servant of the defendant), upon which the plaintiff was riding, a collision took place, which resulted in great personal injury to the plaintiff.

* 2 Stat. at Large, 159.

The circumstances connected with the plaintiff's trip and the manner and purpose of his firing the engine, as well as some conversation of his after the injury, are detailed by the witnesses as follows."

Then followed the testimony of seven witnesses—two on one side, five on the other—examined and cross-examined. These witnesses testified that the plaintiff *had* been, a week previously to the accident, a fireman on the railroad, but had been—as some signified it might be—"dismissed"—though, as it rather appeared, possibly—"suspended;"—that is to say, owing to the diminished business of the road at that exact season, had been taken off the pay-list; as the company did continually with its hands on the decrease of its business at particular times in the year, and put on a list of persons who would be preferred when, with the increase of business, the company would again require more aid. "Its business was unsteady." Such persons, it was testified, were under no obligation to come back, nor was the company bound to employ them again, but it was a custom if they were at hand to set them to work again as soon as there was work. Daniels, it was testified, had been inquiring two or three days previously to the day of the accident when he should be employed again, and was told that it might be in one, two, three, or four weeks; that it would depend on the business of the road.

On the day of the accident he came to the master mechanic, within whose business it was to employ and discharge firemen, and asked, as some witnesses testified, for "a pass"—though others heard nothing about "a pass"—to go to a place called Peru to get his clothes. The master, according to his own testimony, told him that the company was going to send an extra engine down that night or the next, and that he could "fire" that engine down; though according to the testimony of another witness, the master told him that if he would fire that engine down he would give him a pass: "that was the understanding between them." The master himself swore that there was no agree-

ment that he should fire the engine in consideration of his passage on it. The company, it was sworn to, was not in the habit of making that sort of agreement, and the master mechanic had no right to make such arrangements or to give "passes." He supposed, according to his own testimony, that a sub-officer whose duty it would be, unless directed to the contrary, to put the man's name on the pay-roll when he saw him serving on the engine, would put his name on the roll accordingly.

There was other testimony, all directed to the fact whether or not the man was actually reinstated or whether he was hanging on only, expecting to be, and had now, in consideration of "firing" the engine on a particular trip, been given the privilege of a passage on it to go and get his clothes.

The record, after mentioning certain facts that were proved, thus went on:

"This was all the evidence bearing upon the case, and thereupon it occurred as a question whether, in point of law, upon the facts *as stated and proved*, the action could be maintained, and whether, consequently, the jury should be instructed that under the facts as proved the plaintiff could not recover; upon which questions the opinions of the judges were opposed. Whereupon, &c., the foregoing points upon which the disagreement has happened is ordered by the judges to be stated and certified to the Supreme Court of the United States, &c., for its final decision."

The case came here accordingly by a certificate that the opinions of the judges were opposed on the points set forth, and was argued by *Messrs. Hurd and Booth, for the plaintiff, and by Messrs. Cook and Winston, contra*, on the questions of law and fact presented;—questions, however, which this court did not consider; their opinion going to the matter of jurisdiction only.

Mr. Justice SWAYNE delivered the opinion of the court.

This case is brought before us by a certificate that the opinions of the judges of the Circuit Court below were opposed upon the points set forth; the proceeding having

been taken under the sixth section of the act of the 29th of April, 1802.

To come properly before us, the case must be within the appellate jurisdiction of this court. In order to create such jurisdiction in any case, two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority.*

The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.†

The section referred to of the act of 1802 mentions several particulars, all of which must appear in the certificate. They are jurisdictional, and a defect as to either is fatal.

The one which has most frequently been the subject of discussion, and which it is necessary to consider in this case, is "the point upon which the disagreement of the judges" occurs.

It must be a question of law, and not of fact.‡

It must arise in the progress of the cause, and not incidentally, or in relation to a collateral matter, after the rendition of the judgment or decree. Where the question certified was as to the amount of the bond to be given upon the allowance of a writ of error, and where it was as to the retaxation of costs after the principal of the judgment had been collected, this court held that it could not take jurisdiction.§

* Marbury v. Madison, 1 Cranch, 137; Sheldon v. Sill, 8 Howard, 448.

† Durousseau v. United States, 6 Cranch, 314; United States v. Moore, 3 Id. 159; Barry v. Mercein, 5 Howard, 119.

‡ Dennistoun v. Stewart, 18 Id. 565.

§ Devereaux v. Marr, 12 Wheaton, 213; Bank United States v. Green, 6 Peters, 26.

It cannot arise upon a motion for a new trial, the decision resting in the discretion of the court, and not being subject to exception.*

It may arise upon a special verdict, or a motion in arrest of judgment.†

The question, whether a demurrer shall be sustained? is not sufficiently definite. The precise legal point involved, upon which the judges were divided in opinion, should be stated. The court is not bound to look beyond the certificate to ascertain the point.‡

Nothing which may be *decided* according to the discretion of the court can be made the subject of examination here in this way.§

But if in connection with the discretion which the court below is asked to exercise, questions are presented which involve the right of the matter in controversy, this court will entertain them.‖

Except under peculiar circumstances, this court will not take cognizance of a question certified upon a division *pro formâ*.¶

The determination of the questions certified does not affect the right to bring up the whole case, by a writ of error or appeal, after it is terminated in the court below.** When a certificate of division is brought into this court, only the points certified are before us. The cause remains in the Circuit Court, and may be proceeded in by that court according to its discretion.††

Where the question certified was, whether a letter written by a cashier without the knowledge of the directors was

* United States v. Daniel, 6 Wheaton, 545.

† Somerville Executors v. Hamilton, 4 Id. 230; United States v. Kelly, 11 Id. 417.

‡ United States v. Briggs, 5 Howard, 208.

§ Davis v. Braden, 10 Peters, 288.

‖ United States v. The City of Chicago, 7 Howard, 189.

¶ Webster v. Howard, 1 Id. 54; United States v. Stone, 14 Peters, 524.

** Ogle v. Lee, 2 Cranch, 33; United States v. Bailey, 9 Peters, 278.

†† Kennedy et al. v. The Bank of the State of Georgia, 8 Howard, 610.

binding on the bank, this court declined to answer, because the solution of the question depended in part upon facts not stated in the certificate.*

The *whole case* cannot be transferred to this court. Chief Justice Marshall says:† "A construction which would authorize such transfer, would counteract the policy which forbids writs of error or appeal until the judgment or decree be final. If an interlocutory judgment or decree could be brought into this court, the same case might again be brought up after a final decision; and all the delays and expense incident to a repeated revision of the same cause be incurred. So if the whole cause, instead of an insulated point, could be adjourned, the judgment or decree which would be finally given by the Circuit Court might be brought up by writ of error or appeal, and the whole subject be re-examined. Congress did not intend to expose suitors to this inconvenience; and the language of the provision does not, we think, admit of this construction. A division on a point, in the progress of a cause, on which the judges may be divided in opinion, not the whole cause, is to be certified to this court."

Where it appears the whole case has been divided into points—some of which may never arise, if those which precede them in the certificate are decided in a particular way—the case will be dismissed for want of jurisdiction.‡

The questions must be separate and distinct, and each one must be particularly stated with reference to that part of the case upon which it arose. They must not be "such as involve or imply conclusions or judgment by the judges upon the weight or effect of the testimony or facts adduced in the cause."§

The question must not be general nor abstract, nor a mixed one of law and fact. If it be either, this court cannot take jurisdiction.‖

* United States v. The City Bank of Columbus, 19 Howard, 384.

† United States v. Bailey, 9 Peters, 278.

‡ Nesmith et al. v. Sheldon et al. 6 Id. 41.

§ Dennistoun v Stewart, Id. 18, 565.

‖ Ogilvie et al. v. The Knox Insurance Company, Id. 577

In the case before us the questions certified are, "whether, in point of law, upon the facts as stated and proved, the action could be maintained; and whether, consequently, the jury should be instructed that, under the facts as proved, the plaintiff could not recover?"

Upon looking into the record, we find a body of facts stated as having been proved, and the testimony of numerous witnesses set forth at length, as respectively given. The entire case is brought before us, as if we were called upon to discharge the twofold functions of a court and jury. At the threshold arises an important question of fact, not without difficulty. It is, whether the plaintiff is to be regarded as a passenger, or a servant of the defendant, at the time he received, upon the locomotive, the injury for which he sues? Upon the determination of this question depend the legal principles to be applied. They must be very different, as the solution may be one way or the other.

The Constitution wisely places the trial of such questions within the province of a jury, and it cannot be taken from them without the consent of both parties. Here, such consent is given; but it is ineffectual to clothe us with a power not conferred by law. In the light of the authorities to which we have referred, it is sufficient to add that the questions certified are not such that we can consider them.

According to the settled practice, the case will, therefore, be dismissed for want of jurisdiction, and remanded to the Circuit Court, with an order to proceed in it according to law.

DISMISSED, AND ORDER ACCORDINGLY.

[See *infra*, p. 294, *Havemeyer* v. *Iowa County*, 2.—REP.]

NEWELL *v.* NORTON AND SHIP.

1. A libel *in rem* against a vessel and personally against her master may properly under the present practice of the court be joined. And if the libellant have originally proceeded against vessel, master, *owners, and pilot*, the libel may with leave of the court be amended so as to apply to the vessel and master only in the way mentioned.

2. Such an amendment, neither increasing nor diminishing their liability, will not discharge the sureties to the usual bond given on release of a vessel seized by process of the admiralty.
3. A person who is master and part owner of a vessel in which a cargo has been wrongly sunk by collision from another vessel, may properly represent the insurer's claim for the loss of the cargo, and proceed to enforce it *in rem* and *in personam* through the admiralty.

The court, seeing no reason to doubt the correctness of a decision below, again declares what it has often before decided, that it will not reverse from doubt where the issue is one entirely of fact, depending on the credibility of witnesses who differ in their statements, and where the District and Circuit Courts have concurred in viewing the merits. And it announces emphatically that in cases where both courts below concur, parties need not bring appeals here with the expectation of reversal because they can find in a mass of conflicting testimony enough to support the appellant's allegation if the testimony of the other side be wholly rejected, or by attacking the character of witnesses and so raising a mere *doubt* as to what justice required.

THIS was an appeal from a decree of the Circuit Court for Louisiana *affirming a decree of the District Court* in admiralty in a case of collision between the steamboats Hill and World.

The owner of the World filed his libel in the District Court, March 12, 1863, setting forth that his vessel, sailing down the Mississippi and laden with a valuable cargo, had been lost by collision with the Hill, and solely through the fault of the Hill.

The collision out of which the proceeding came, took place in a bend of the Mississippi below the town of Princeton, Mississippi. The Hill received no material injury. The World sank almost immediately, carrying down with her about thirty persons. *The wreck and cargo were soon afterwards abandoned to the underwriters:* who subsequently assigned their claims to the libellant.

The account of the catastrophe, as given by the libellant, was briefly this: that the World was descending the river in the ordinary channel, when the Hill, which had been running up on the Mississippi side, came quartering out from that side, attempted to cross the river in front of the descending boat, but, being a little too late, ran into her and sunk her.

The libellant accounted for the accident on the ground

that the pilot of the Hill failed, for want of proper watchfulness, to discover the World in time to avoid the collision; that he was either ignorant or disregardful of his obligations to obey signals which he ought to have obeyed; and that he manœuvred his boat with entire want of skill.

The respondent admitted an attempt of the Hill to cross the river, but asserted that it was effected in safety, and that, after the Hill had gained the Arkansas side, the World came square across the river, directly towards the Hill, struck her, inflicting, however, no damage, but was herself by the blow stove in and sunk.

The District Court, *in accordance with the prayer of the libel*, issued process *in rem* against the Hill, and citations *in personam* against the captain, owner, and pilot. The 15th rule in admiralty of this court, of the Rules of 1845,* it should be said, allows a libellant, in all cases of collision, "to proceed against the ship *and* master, or against the ship alone, or against the master or the owner alone, *in personam*."

The owners of the Hill, of *whom the master was one*, put in a claim, and on the same day the boat was released on a bond, conditioned that *the claimants and sureties should abide by all the orders of the court, and pay the libellant the amount awarded by the final decree.* The claimants immediately afterwards filed an exception to the libel for misjoinder of owners and pilot in a proceeding against the vessel and master, and prayed that the libel be dismissed. The court ruled that an action against the owners and pilot could not be joined with the proceeding *in rem*, and that the libellant must elect which remedy he would pursue; and he having elected to proceed *in rem* against the steamboat, and *in personam* against the master, it was ordered that the libel be dismissed as to the owners and pilot, and sustained against the steamboat and master. Proofs were then taken.

The testimony was voluminous and conflicting. With the documents it filled a book of three hundred and ten pages of long primer, "solid." One hundred and ten persons, first-

* 8 Howard, vi.

and last, and through a term of five years that the case was in the courts below, were examined. It embraced a number of questions, as whether a sufficient watch had been kept—sufficient and proper signals given—whether the engines had been rightly worked when the boats approached—whether certain officers of the World were or were not intoxicated—what was the character of the pilots for sobriety and skill—and whether Henry Evans, "a flatboat pilot" on the Mississippi, who saw the collision and testified strongly that the Hill was to blame for it, was worthy of faith—seven persons swearing that he was not, and twenty-two that he was. And finally, whereabouts exactly in a bend of the river the collision took place, and what topographical inference could be made from the hydrographical fact that portions of the World's cargo had floated to a particular spot of the shore; and that cattle which had been on the boat were found the next morning walking contemplatively in the State of Mississippi and not in the opposite one of Arkansas.

The District Court decreed for the libellants ($52,500); *a decree* which the Circuit Court, on full consideration and after giving an opinion at large, which the record contained, *affirmed* with interest and costs.

After the decree in the Circuit Court a motion was made for a re-hearing, "upon the ground that the court had erred in its view of the evidence, and that the damages ought to be apportioned." This motion was refused; Campbell, J., who gave its opinion, saying:

"I have considered the evidence with much care; it is very conflicting; and an opinion founded upon one portion of it must necessarily be hostile to conclusions which have their support in another portion. I think it is a case in which men may naturally form different conclusions, *and that an appeal is a very proper remedy for the party who is aggrieved. A re-hearing of the case would not speed the cause to its final determination;* and, upon the suggestions that the decree is erroneous, I do not think I should be authorized to allow a re-hearing."

The case was now here on appeal.

Argument for the appellant.

Mr. Speed, A. G., and Mr. Ashton, acting as private counsel, for the appellants: It has never been decided nor recognized as a principle of admiralty practice that the misjoinder of actions can be cured by putting the libellant to his election. The libel ought to have been dismissed, and then the party asserting himself to be aggrieved could have filed his libel rightly. Before the adoption of the admiralty rules of 1845, the proceeding *in rem* could not be joined with a suit *in personam;* and the right to unite these distinct remedies in the same libel is given solely by virtue of these rules. By authorizing the two remedies to be blended in the same libel they made an innovation in established practice, and the libellant must have complied literally with their provision. The amending of a libel, all wrong originally, was improper.

2. *As respects the discharge of the sureties.* The boat was not seized again after the change in the libel, and no new bond was given or required. The sureties bound themselves with reference to the libel. The contract of suretyship is *stricti juris*, and cannot be extended by implication.* The undertaking of the sureties was to satisfy such decree as might be rendered upon the libel filed, under which the vessel had been seized; and it is obvious that no other decree could have been rendered upon the libel, in its original form, than one of dismissal. If the libel was not authorized by law, if, in fact, as was the case, it was in direct violation of the law and the rules adopted by this court governing proceeding in the admiralty, the seizure and detention of the boat were illegal *ab initio;* and the bond given for her release was without consideration and void.

When, therefore, the libellant elected to proceed *in rem* against the vessel, and *in personam* against the master alone, he attempted to place the sureties *in duriori casu* than that contemplated by them at the time they contracted as sureties, and to change the obligation which they had assumed, which was to satisfy such decree as might be rendered upon the

* Smith v. United States, 2 Wallace, 219.

libel filed, into an obligation to respond to a decree to be rendered upon a new libel, freed from the objection which made that with reference to which they had bound themselves void; an obligation to which the sureties in no manner have assented. Of course they are discharged.

3. *The libellant here but represents the underwriters, or the vessel and cargo.* Now can a claim for damages resulting from a collision be assigned so as to convey to the assignee the lien which may have existed in favor of the assignor, and to vest in the assignee the right to proceed in the admiralty in his own name for reparation for a wrong which was not done to him nor to his property? We think not. The admiralty has no jurisdiction unless the contract which the libellant seeks to enforce is maritime. A contract may be maritime, but it would by no means follow that the assignment of that contract must also be maritime. An assignment is not and never can be a maritime contract; it is always an ordinary civil contract. Maritime liens are not established by the agreement of the parties, except in hypothecations of vessels, but they result from the nature and object of the contract. They are consequences attached by law to certain contracts, and are independent of any agreement between the parties that such liens shall exist. They, too, are *stricti juris.* Indeed, the only power the contracting parties have respecting such liens as attach as consequences to certain contracts is, that the creditor may waive the lien, and may by express stipulation, or by his manner of dealing in certain cases, give credit exclusively to those who would also have been bound to him personally by the same contract which would have given rise to the lien.

4. *As to merits.* [The learned counsel here proceeded to collocate and present the evidence, so that it bore in a strong way against the World; and argued that, rightly considered and according to the weight of the evidence, reference being had to the character of the witnesses as sworn to for truth, the fault was with that vessel, not at all with the Hill.]

Argument for the defendant.

Messrs. Carlisle and McPherson, contra: This libel is not multifarious within a proper definition of the term. It states but one cause of action, and seeks but one measure of relief. And it is a proof of this, that if any one of the defendants would satisfy the demand set forth against him, it would be a satisfaction of the whole cause of action.

The real defect of the libel was in making parties of persons who could not be made liable in that form of action. It was a misjoinder merely, and so a defect of form. What, then, should have been the ruling of the District Court? The claimants say, to have dismissed the libel as to all the parties. But this court said, in the case of *The Schooner Adelide*:* "When merits clearly appear on the record, it is the settled practice in admiralty proceedings not to dismiss the libel, but to allow the party to assert his rights in a new allegation." So in *The Commander-in-Chief*† they said: "*Objections to parties*, or for want of proper parties, should be made in the court below, when amendments may be granted in the discretion of the court. *Parties improperly joined may, on motion, be stricken out*, and new parties may be added by a supplemental libel and petition."

But it is further objected that, by allowing the libellant to amend, or dismissing the bill as to certain parties, injustice was done to other parties—to the sureties; who, having agreed to abide the result of a libel which could not be sustained, have to abide the result of one which has been thus freed from objection. The same objection was raised in the case of *The Harmony*,‡ but was not held of force. It was there observed, that it would not have force in a common lawsuit; and *à fortiori* would find no support in a court exercising admiralty jurisdiction.

It being then established that the libel was not to be dismissed, the next question was, who were the improper parties, and how to get rid of them? The District Court ruled simply that the libellant could not proceed against all whom he had made parties, and left it to himself to select those

* 9 Cranch, 244. † 1 Wallace, 852. ‡ 1 Gallison, 125.

whom he would pursue. He made his election, and then the court made the order which it did. This, we suppose, was in substance an amendment of the libel; and, if it was, no question can be made to it here.*

The objection, that the libellant cannot proceed in the face of an abandonment to the underwriters, is without force. As owner of a steamboat employed in transporting goods generally, the libellant was a common carrier and bailee, and liable to the shippers. In the case of *The Commander-in-Chief*, above cited, this court intimated, that where the libellant was prosecuting for the benefit of other parties not named, as well as his own, it would be more regular that it should be so averred in the libel; still they overruled the objection for want of such an averment, observing that no inconvenience could result from the rule, as there was ample power in the court to protect the rights of shippers, who may intervene at any time before the fund is actually paid out of the registry. And, indeed, the specific defence, founded here on the dealings between the libellant and the insurers or owners of the cargo, is disposed of by the ruling of this court in the case of the *Propeller Monticello* v. *Matteson*,† with which the bar is familiar.

The merits. It is impossible that a more ingenious argument could have been made on the evidence than has been. All that careful collocation of the facts, and skilful presentation can do, has been done. But we shall not respond largely to that sort of argument. The case is one of fact only; and where, on a deal of conflicting testimony, two courts from which appeals have been taken have decided in one way, this court will not easily reconsider. This court is already overburdened with business. It has more than it can do in passing upon the great causes which properly belong to it; upon those momentous questions which arise from our civil war; those great questions of national law which arise in time of peace; questions of the rights of foreigners; questions of the conflicting claims of States; of

* Spencer v. Apsley, 20 Howard, 264. † 17 Howard, 152.

the effect of State laws and of State decisions upon rights claimed under the United States, and on interests which are supposed to be put beyond the reach of State legislation by the Constitution of the United States. Mingled with which come of necessity questions of commercial, social, domestic, and other *law;* all of which it must pass on; questions than which, when considered in their immense magnitude and number, it is impossible to conceive of any more various, greater, or of higher dignity.

With what propriety, then, is this court so constantly vexed with these questions of fact? called on to settle issues of *ebrius vel non* between two deck-hands of a Mississippi boat; and to announce to the bar of the civilized world *its* solemn judgment on the point, whether a half-tipsy sailor saw or did not see, of a dark night, down a distant river, a particular signal, which another sailor, a little more or less tipsy than himself, raised or did not raise for him to look at? A common jury, it is no offence to this court to say, could decide the case as well. The District and Circuit Courts, which have more leisure to hear, and completer power to examine witnesses, better. The decisions are unintelligible when reported, and would be worthless if understood. Of what importance is it to the law as a science, whether, on a certain night, a certain boat-hand—as to whose having been intoxicated ten persons swear one way, and ten others swear another and opposite way—trimmed or did not trim his lamp-wicks in the way in which he ought to have trimmed them? or whether a second boat-hand shouted or did not shout as loud as he ought to have shouted, "Halloa there! Take care!"? Who on earth but the parties to the very suit care for such decision when made? And of what interest even to them is an opinion which shows, though incontestably, its rectitude? The court has laid down principles, in accordance with ancient rules of law, that should keep such cases out of this place, and which quite relieve us from largely following the able arguments opposite, so far as they apply to facts only. *The Ship Marcellus* is in point.* Grier,

* 1 Black, 417; and see the able argument in The Cornelius, *supra*, p. 214.

J., there declared, in behalf of the Bench, that any appellant coming here on cases of this sort has "*all* presumptions against him."

Reply: If the argument of the other side would have force in any case so long as statute gives appeals here as well as writs of error, it can have none in this case. The court below refused to hear us fully, because "the case was one on which men might naturally form different conclusions;" and because, therefore, "appeal" and not "rehearing" was the proper remedy. We were sent *to* this court by one of its then justices specifically, because of the conflict of testimony, and the learned counsel would now send us *out* of it for the precise same reason. Certainly, we ought to be heard, and to have justice, somewhere. But between the upper and the nether courts, if such views as the opposite counsel would enforce prevail, justice would, in cases like the present, be surely ground to powder.

Mr. Justice GRIER delivered the opinion of the court.

The libel in this suit was originally against the steamboat Hill, and against the master, who was part owner, and, also, against the pilot. It was amended in the District Court by dismissing it as to the pilot, and sustained as against the vessel and the master, or owner. The allowance of this amendment was within the discretion of the court, and was very proper. The objection that a libel *in rem* against a vessel, and *in personam* against the owner, cannot be joined, was properly overruled; as it was in conformity with the 15th rule in admiralty as established by this court.

It has been objected here, that the allowance of the amendment was injurious to the sureties in the bond given for the property. But this objection is without foundation, as their liability was neither increased nor diminished. "Every person bailing such property is considered as holding it subject to all legal dispositions of the court."*

* The schooner Harmony, 1 Gallison, quoting King v. Holland, 4 Term, 460.

It has been contended, also, that the right of the libellant to sustain this action ceased by his abandonment to the underwriters. The Circuit Court very properly ruled, that as the libellant was the owner and master of the steamer World he was the bailee of the cargo, and so responsible to the shippers or insurers for the safe transportation and delivery thereof, and to fulfil his obligations and secure his reward, he was entitled to possession, and might maintain an action for its destruction.* "The respondent is not presumed to know or bound to inquire as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured parties, he cannot be made liable to another suit at the instance of any merely equitable claimant."†

The question of merits was the next question argued.

During the five years in which this case was pending in the District and Circuit Courts, more than a hundred depositions have been taken. In these there is the usual conflict of testimony which always attends such cases. The issue is one entirely of fact, and depending on the credibility of witnesses. The District and Circuit Courts, after patient investigation of the testimony, concur in the opinion that the libellant has fully established his case. The record contains the opinion delivered by the learned judge of the Circuit Court, which fully vindicates the correctness of his decree.

It would be a very tedious as well as a very unprofitable task to again examine and compare the conflicting statements of the witnesses in this volume of depositions. And, even if we could make our opinion intelligible, the case could never be a precedent for any other case, or worth the trouble of understanding.

It is enough to say that we find ample testimony to support the decision, if believed; and that we again repeat, what we have often before decided, that in such cases, par-

* See The Propeller Commerce, 1 Black, 582.

† See Monticello v. Mattison, 17 Howard, 152.

ties should not appeal to this court with any expectation that we will reverse the decision of the courts below, because counsel can find in the mass of conflicting testimony enough to support the allegations of the appellant, if the testimony of the appellee be entirely disregarded; or by attacking the character of his witnesses when the truth of their testimony has been sustained by the opinions of both the courts below. Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony. In the present case we see no reason to doubt the correctness of the decision of the Circuit Court, which is accordingly

AFFIRMED WITH COSTS.

THE OTTAWA.

1. The court admitting that within reasonable limits cross-examination is a right, and on many accounts of great value, reflects upon an exercise of it as excessive in a case where there were between four and five hundred cross-interrogatories.
2. Lookouts must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of their duty.
3. When acting as officer of the deck, and having charge of the navigation of the vessel, the master of a steamer is not a proper lookout, nor is the helmsman.
4. Lookouts should be stationed on the forward part of the vessel where the view is not in any way obstructed. The wheel-house is not a proper place, especially if it is very dark and the view is obstructed.
5. Elevated positions, such as the hurricane deck, are said by the court to be not in general as favorable in a dark night as those usually selected on the forward part of the vessel, where the lookout stands nearer the water-line, and is less likely to overlook small vessels deeply laden.
6. These principles applied, and a steamer condemned in a collision case, for want of a proper lookout; the case being one also where the lights of the steamer were badly attended to and gave imperfect warning.

APPEAL from the Circuit Court of the United States for

the Northern District of Illinois in a question of collision at night, on Lake Huron, between the steam propeller Ottawa and the schooner Caledonia, and by which the schooner was sunk; the decree in the Circuit as in the District Court having been against the steamer as in fault.

The controversy was one chiefly of fact; whether, for example, there was *any one* at all on the steamer's deck about the time of the collision besides the wheelsman then steering the vessel; whether the steamer showed lights as required; what the courses of the two vessels had been, and how far they properly or improperly held them on their approach to each other, and some others not necessary, in view of the decision, to be mentioned. The testimony was conflicting and prolix; the cross-examination of one witness alone having extended to *four hundred and thirty-two inquiries.* The chief *point of law* disputed in the controversy and the matter therefore to which the reporter more particularly directs attention was apparently this: Whether, assuming that the master was on the steamer's deck after the vessels came into such proximity as required precautions, until the moment before the collision occurred—a matter about which there were doubts—he was a competent lookout within the decisions of this court; *he having been, at the time, the officer of the deck, in charge of navigating her, and having been standing with the wheelsman in the wheel-house;* a place which, on this steamer, the mate swore was the best place for a lookout to be, well forward, and giving an unobstructed view; and which the counsel for the owners of the steamer, exhibiting to the court a photograph, stated was less than twenty feet from the bow.

Mr. Dexter for the owners of the steamer; Mr. Proudfoot, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Amended libel alleged that the appellee was the owner of the schooner Caledonia; that on the sixteenth day of September, 1860, she was engaged in prosecuting a voyage

from Chicago to Buffalo, having on board a cargo of six thousand bushels of wheat, belonging to her owner; that, at eight o'clock in the evening of that day, when she was navigating in Lake Huron, eight miles northwesterly from Thunder Bay Light, she encountered the propeller Ottawa, bound up the lake, and that the propeller was so negligently and carelessly managed and navigated that a collision occurred between the two vessels, whereby the schooner, with her cargo on board, was sunk in the lake and lost.

Appellant, in his amended answer, admitted the collision and loss, but denied that the propeller was in fault, and averred as a distinct ground of defence that the collision occurred entirely through the incompetency of those in charge of the schooner, and in consequence of their carelessness and mismanagement.

Decree in the District Court was in favor of the libellant, and the same was affirmed on appeal in the Circuit Court; whereupon the owner and claimant of the propeller appealed to this court.

I. Most of the material inquiries of fact presented for decision are, as usual in this class of cases, involved in perplexing uncertainty on account of the conflicting nature of the testimony. Superadded to that difficulty, which experience shows is one generally to be expected in controversies of this character, the present investigation is greatly complicated and embarrassed by the unreasonable length of the examinations and cross-examinations of the witnesses, as exhibited in the record. Undoubtedly a party calling a witness, may, if he sees fit, examine the witness by specific interrogatories, instead of relying upon the general statements of witness, as made responsive to the oath under which he testifies; and it is equally clear that the opposite party may in all cases cross-examine the witness in respect to all the material matters disclosed in the examination in chief, but it is past belief that everything valuable involved in the right of cross-examination may not be secured without propounding, in a collision case, four or five hundred questions to a single witness.

Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as narrated by the witness in his examination in chief, and the time and place when and where they occurred, and the attending circumstances, and of testing the intelligence, memory, impartiality, truthfulness, and integrity of the witness; but a few questions, well directed to those several objects, are in general amply sufficient to effect all that can well be accomplished by the fullest enjoyment of that admitted right.

II. Embarrassed, however, as the investigation is by the complications and difficulties suggested, still there are some facts and circumstances having an important bearing upon the principal questions involved in the pleadings, which may be regarded as conceded, or as so fully proved that they are not properly the subjects of controversy in the case.

Seaworthiness of the schooner is not denied, and it is fully proved that she was well manned and equipped, and that the master, at the time of the collision, was in charge of her deck. Proofs are also entirely satisfactory that she had an able seaman at the wheel, and a competent lookout, properly stationed, forward of the windlass, having no other duty to perform, and at a place where there was nothing to obstruct his view.

Just before the collision the master was standing near the helmsman, but, when notified by the lookout that he discovered a light, he went immediately forward, in order to determine what, if anything, was necessary to be done.

Prior to six o'clock the schooner had been sailing on a course southeast by south, but, being well out in the lake, the master, as he states, changed her course at that hour half a point to the southward, and he adds that she had been sailing upon that course about two hours.

Evidence is full to the point that the schooner showed a proper light, and the master testifies in substance and effect that she held her course until the collision was inevitable.

Careful examination has been given to the evidence on this last point, and it is not perceived that there is any good reason to doubt the truth of the statement.

Allegation of the libel, as to the time and place of the collision, is correct.

Doubt cannot be entertained but that the propeller was a seaworthy vessel, and it is satisfactorily shown that she was well manned and equipped.

Appellee insists that she was responsible for the consequences of the collision, because she was in fault in three particulars:

1. He insists that she had no proper lookout, as required by the decisions of this court.

2. That she did not show the signal lights, as required by law.

3. That she did not comply with rule of navigation, which requires that where a steamer and a sail vessel are approaching each other from opposite directions, or on intersecting lines, the sail vessel shall hold her course and the steamer shall keep out of the way.

1. Argument for the appellee assumes that there was no one on the deck of the propeller, except the man at the wheel; but the appellant insists that the master, also, was on deck, and contends that the master, under the circumstances of this case, was a competent lookout within the meaning of the decisions of this court. Strong doubts are entertained whether he was on deck at all after the vessels came into such proximity as required precautions, until the moment before the collision occurred; but in the view taken of the case, it is unnecessary to decide the point, as it is clear that if he was on deck, as is supposed by the appellant, still he was not a proper lookout within the requirement of the rules of navigation, as expounded by the decisions of this court.

Two objections are made to the master, as lookout, even admitting that he was on deck, and they are both well taken. Admission of the appellant is, that the master was the officer of the deck, and that he had charge of navigating

the vessel, and the proofs are satisfactory that if he was on deck at all at that time, he was in the wheel-house with the man at the wheel. Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. They must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty.* Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose, on the forward part of the vessel; and the pilot-house in the night time, especially if it is very dark, and the view is obstructed, is not the proper place.† Lookouts stationed in positions where the view forward or on the side to which they are assigned, is obstructed, either by the lights, sails, rigging, or spars of the vessel, do not constitute a compliance with the requirement of the law; and in general, elevated positions, such as the hurricane deck, are not so favorable situations as those more usually selected on the forward part of the vessel, nearer the stem.* Persons stationed on the forward deck are nearer the water-line, and consequently are less likely to overlook small vessels, deeply laden, and more readily ascertain their exact course and movement.‡ Applying these rules to the present case, it is clear that the propeller did not have any proper lookout, and it will be sufficient to say that we adhere to those decisions without abatement or qualification.

2. Second objection urged by the appellee is, that the propeller did not show the signal lights required by law.

Proper signal lights as required on steamers are, a bright light forward, a red light on the larboard side, and a green light on the starboard side. Considering that the parties

* Chamberlain et al. v. Ward, 21 Howard, 570.

† St. John v. Paine, 10 Id. 585; Genessee Chief, 12 Id. 483.

‡ Haney v. Baltimore Steam Packet Co., 23 Id. 292; New York et al. v Rae, 18 Id. 186.

will not be benefited by an extended analysis of the testimony, it is not deemed necessary to do more on this branch of the case than to state our conclusions. Better opinion is, that the red light was burning dimly at the time of the collision, but that the other lights had ceased to burn so as to be visible to those on board the schooner. Tendency of the proof also is, that all the lights had been lighted at the usual hour; but that the white and green lights, either because the lamps were not well trimmed, or because the oil was poor, or from both causes combined, had gone out or burned so dimly as to answer no valuable purpose. None but the red light was seen by those on the deck of the schooner, and even that was not seen in season to afford any protection.

8. Third charge of the appellee against the propeller is, that she did not comply with the rule of navigation, which required her to keep out of the way of the schooner. Corresponding charge of the propeller against the schooner is, that she did not hold her course; but the latter charge cannot be sustained, because it is not supported by the weight of the evidence, except so far as it relates to the change made at the moment of collision, which is not a fault that will avail the other party.

Rules of navigation are obligatory from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain; but they do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description while they are yet so distant from each other that measures of precaution have not become necessary.

III. Theory of the appellant is, that the propeller was to the leeward of the schooner, and that she was sailing northwest. Assuming that theory, he contends that the collision could not have occurred as alleged in the libel; and it may be that the theory, as a mere abstraction, is correct; but the best answer to it is, that the collision did take place, and the schooner, with her cargo, was sunk in the lake. Taken as

a whole, the proofs afford full satisfaction that the schooner did not change her course until all hope of avoiding the collision was gone.

Great conflict exists in the testimony as to the course of the propeller; but the best conclusion that can be formed from it is, that she was to the windward of the schooner. Both the lookout and the master of the schooner first saw the dim red light of the propeller nearly ahead over the starboard bow. Conceded fact is, that the propeller ported her helm; and, if so, she must have headed across the bows of the schooner. Confirmation of that view is derived from the manner in which the two vessels came together. Undisputed fact is, that the schooner, at the moment of collision, also ported her helm, doubtless with the hope of passing under the stern of the propeller; but the bowsprit, in a glancing blow, struck the larboard quarter of the propeller, which opened the starboard bow of the schooner, stove in the bow, tore off her headgear, split the bow open, opened the knight-heads, and broke the rail and stancheons on the larboard side. Weight of the blow was rather on the larboard side of the schooner; but the bowsprit, operating as a lever, opened the starboard bow. Injury to the propeller was on the larboard quarter, and it shows to a demonstration that the two vessels came together in the manner described by the witnesses of the libellants.

Decree of the Circuit Court is therefore

AFFIRMED WITH COSTS.

GRIER, J., assuming the facts differently, dissented.

CINCINNATI CITY *v.* MORGAN.

1. The properly constituted authorities of a municipal corporation may bind the corporation whenever they have *power* to act in the premises.
2. To acquire, as against all mortgagees and incumbrances, a lien by statute upon the *corpus* of a railroad, in virtue of credit advanced, it is necessary that the statute express in terms not doubtful the intention to give

a lien. The fact that, on one side, by not making a particular clause in the statute operate as a lien on the road, you leave it but declaratory of ordinary law, is not enough to give a lien, when, on the other, by making the clause so operate, you would give one where the parties have declined to *take one in ordinary form* and contracted for a pledge of the *capital stock* of the road.

Ex. gr. The Ohio legislature, authorizing the City Council of Cincinnati to issue its bonds for $1,000,000 to a certain railroad, enacted:

"That it shall be the duty of the said City Council, and it is hereby authorized, to contract with the said company, to secure, by mortgages, transfers, or *hypothecations of stock* of said company, *or* by such *other liens or securities*, real or personal, as may be mutually agreed on, the payment of the amount of the principal of such bonds as may become due, and for the reimbursement of the interest upon the same, which shall have been paid by the city; *and for the further purpose of the securing the city against all loss or losses which the same may suffer, whether by the payment of the said principal or interest, or any damages arising therefrom, that the above described liens, mortgages, or other securities, shall have priority or precedence of all claims or obligations subsequently contracted by such company, and over other liens, securities, or mortgages which were not duly entered into between the company and other persons, before the respective issues and loans aforesaid.*"

The city, having first resolved, as a popular vote had apparently contemplated that it should do, to lend its bonds on a mortgage of "*the property of the company*," took afterwards a hypothecation, mortgage, and pledge of twenty thousand shares of its "*capital stock.*"

Held, that neither by the terms of this statute, nor by certain other statutes, relied on as helping out the lien, nor in any other way, was a lien on the *road* given to the city as against subsequent mortgagees.

BY an act passed by the legislature of Ohio, 20th March, 1850, the city of Cincinnati was authorized to issue its bonds to the amount of $1,000,000, to be lent to the building of railroads terminating in the city, or to be subscribed to their capital stock, on a vote of the qualified voters of the city, and of the City Council. The Ohio and Mississippi was one of these roads. A vote was obtained in favor of this railroad company, agreeing to the issue of bonds to the amount of $600,000 of the city, to be secured by a mortgage upon such property of the company as the City Council should require.

The seventh section of this act of 1850 provided, in substance, as follows:

"That it shall be the duty of the said City Council, and it is hereby authorized, to contract with the said companies, to secure, by mortgages, transfers, or hypothecations *of stock* of said com-

pany, or by such *other liens or securities, real or personal*, as may be mutually agreed on, the payment of the amount of the principal of such bonds as may become due, and for the reimbursement of the interest upon the same, which shall have been paid by the city; and for the *further* purpose of the securing the city against *all* loss or losses which the same may suffer, whether by the payment of the said principal or interest, or any damages arising therefrom, that the above-described liens, mortgages, or other securities shall have *priority or precedence* of *all* claims or obligations *subsequently* contracted by such company, and over other liens, securities, or mortgages which were not duly entered into between the company and other persons, *before* the respective issues and loans aforesaid."

The ordinance of the city in respect to the security for its loan, as above authorized, was thus:

"That before the bonds, or any part thereof, shall be delivered over to the said company, it shall mortgage, hypothecate, pledge, and deliver to the city, $1,000,000 of the capital stock of said company, under seal, and shall authorize the City Council to sell and dispose of so much of the stock as will realize the aforesaid sum of $600,000; said stock to be sold at such times, in such sums, and upon such terms as the City Council may determine; and appropriate the proceeds in such manner as the same may direct."

The terms mentioned in this ordinance were assented to by the company, and a certificate was duly issued, stating that the City of Cincinnati "is the owner of twenty thousand shares of the capital stock in the Ohio and Mississippi Railroad Company, transferable on the books of the company, at the Cincinnati office, upon surrender of this certificate." The certificate was indorsed:

"This stock is issued, mortgaged, hypothecated, and pledged to the City of Cincinnati, as security for the loan of the bonds of the city for $600,000," &c.

This certificate of stock was accepted by the City Council and deposited with the City Treasurer, and bonds of the city

were soon after issued to the company to the amount of the $600,000.

Subsequently to this transaction the railroad company made different mortgages of their road and its fixtures, and a bill of foreclosure having been filed under one of them—the second—and the City of Cincinnati made a party defendant, the city put in an answer, alleging, among other things, that she had lent to this railroad company her bonds to the amount of $600,000, and had a lien on the road as security paramount to any mortgage. This was denied by the holders of the bonds under the second mortgage, and, whether the city had or had not such a lien, was the question.

To understand the argument made here by the city's counsel, and which sought to support the lien, if support was wanted, by reference to other statutes of Ohio, it may be necessary to add:

1st. That prior to the date of these transactions, or of the act of 20th March, 1850, there was a law in force in Ohio, known as the General Railroad Law. This law—the provisions of which, it was said, had been extended to the Ohio and Mississippi Railroad (originally incorporated in Indiana)—gave power, by its 13th section, to railroad companies to borrow money, and to execute bonds or notes therefor; and in order to secure the payment thereof, to pledge their property and income; "provided," the act went on to say, "that the value and security of any liens, mortgages, or the stock held in or *against* such company *by the State or the City of Cincinnati*, should not thereby be injured or otherwise impaired."

2d. That subsequent to the act of March 20th, 1850, an act of February 10, 1851, authorizing the city to subscribe to another railroad—the Cincinnati Western—was passed; which act contained, in one of its sections—the 15th—exactly the same language as has been presented, *supra*, pp. 276–7, as making the 7th section of the act of March 20th, 1850, now under consideration, but contained, *in addition*, the following as its 16th section:

"That the City Council of the City of Cincinnati shall not lend

her credit or issue her bonds to this or any other railroad company, unless the *private stockholders mortgage a sufficient amount of real estate, in addition to the road and other effects of said company or companies, as security for the lending of her credit or issuing of such bonds by said city.*"

Certain other incidents of the case may be mentioned; as,

1. That the original proposition made by the City Councils to the people, to be voted on, was whether the city should issue the $600,000, to "be secured by a *mortgage* upon such property of *the company* as the City Council shall require," and that this was the question voted on.

2. That when, after the popular vote authorizing the loan of the city's credit, the city directed its president of council to execute, issue, and deliver the bonds to secure the said loan, it did so reciting the loan as one "which shall be by mortgage *on* the said road."

3. That subsequently to this date another ordinance was passed:

"That so much of the before-recited ordinance as requires the loan of $600,000 to said company, to be secured by a mortgage on said road, be hereby repealed; provided, that before the bonds, or any part thereof, shall be delivered over to said company, the said company shall mortgage, hypothecate, pledge, and deliver to said City of Cincinnati, one million of dollars of *the capital stock* of said company, under seal, authorizing the City Council to sell and dispose of so much of the stock as will realize the aforesaid sum of $600,000; said stock to be sold at such times, in such sums, and upon such terms as the City Council may determine, and appropriate the proceeds in such a manner as said council may direct; provided further, that said company shall oblige itself, by writing under seal, in case of failure to pay interest upon said loan, to transfer to said City of Cincinnati a sufficient amount of the capital stock of said company, with authority to sell the same, as will realize the amount of interest unpaid."

The court below—considering that the pledge was but of *certificates of stock*, one of the forms of security allowed by the 7th section of the act of 20th March, 1850, and that

neither the 18th section of the general law incorporating railroads, nor the 16th clause of the act of February, 1851, incorporating the Cincinnati Western Railroad Company, and which required a pledge of the private property of the stockholders applied to the case—decreed that the city had no lien whatever on any property of the railroad, except upon the stock pledged to it. And an appeal was now here.

Mr. Stanbery, for the city: Has the city a lien on the road in this case?

I. We submit that the 7th section of the act of March 20th, 1850, on its own face gives it. This section makes it the *duty*, and authorizes the City Council to *secure* the payment of the principal and interest of these bonds. The sole purpose of this section was *security* to the city for the bonds to be issued. The section does not stop with the clause, giving a choice as to the nature of the security. It proceeds to declare, that for the "further purpose of securing the city" from *all* loss or damage, the *security given* shall have priority over *all* claims, liens, mortgages, or securities, subsequently created.

Effect must be given to this part of the section. It must be taken into the account and receive a construction; or, rather, to state the point more accurately, *the whole* section must be construed, and every clause be made to operate.

The council first fixed upon a mortgage on the *road* as the form of security, and the popular vote ratified the loan upon that basis; the company accepted the loan upon the same basis, and afterwards the council dispensed with security by mortgage, and accepted an hypothecation of stock. This was one of the forms of security named in the 7th section.

Will it be argued, that upon this change a lien upon the stock was substituted for a lien upon the road, and that to make the lien operate on the road also, under the subsequent clause, frustrates the election as to the form of security given

in the first clause? or argued, that the priority of lien provided for in the last clause, means only a priority over the securities of a like kind with the one adopted under the first clause? This construction, if tenable, would, indeed, harmonize the entire section; but it is not tenable.

In the first place, there was no necessity for such a provision, for either form of security taken under the first clause would necessarily have precedence over a subsequent security upon the same subject-matter.

In the next place, that construction does not cover all the terms of the last clause, for the priority is not confined to other liens, whether like or unlike the security taken, but extends as well to *all* claims or obligations, without lien, subsequently contracted.

Undoubtedly, as to claims without lien, this clause gives to the city precedence over them all, not only as to the stock hypothecated, but as to all other property of the company. The clause does not apply merely to precedence over the thing pledged; for those creditors had only a right to look to so much of the property as was not pledged, or if to property incumbered, subject to the incumbrance.

There are other reasons why this construction cannot be allowed.

Let us first consider the subject-matter. It is a loan of the credit of the city in the form of bonds, payable as to principal at a distant day, and as to interest semi-annually. No money is lent. No debt arises in favor of the city and against the company in the beginning. The parties stand in the relation of principal and surety, and not of debtor and creditor. But whenever the liability should accrue, and the city be obliged to advance money upon the default of the company to meet an instalment of interest, a debt would arise for which the city would require prompt payment, or the means of enforcing prompt payment. Eventual indemnity, by the slow process of judicial proceedings, would not meet the emergency. It was, therefore, natural and proper that, in addition to eventual indemnity, provision should be made in some other form for prompt protection.

Now, consider in this light the various provisions made in this seventh section.

The council is, in the first place, required to take security for the payment of the bonds as they become due, "and for the reimbursement" of interest which may have been paid by the city. It could not have been the intention of the legislature to leave the city with nothing to rely upon but personal security for a liability so large, and extending through a period of thirty years. Nor if the protection of the city was to be limited to the exact scope of the security to be taken, would we look to find so important a matter left wholly to the discretion of the City Council. But when we consider this clause as more especially intended for *prompt* protection—as for the reimbursement of interest paid by the city—then it seems reasonable, nay very wise, that full discretion should be left to the council to select, through the whole range of securities real or personal, that form which would be most ready and available. One can see, that for this purpose a pledge of stock, with power to realize by sale, is the most desirable and available form of security. There is an open market for *it*, though seldom for a large mortgage.

Next consider the phrase with which the second clause of the section commences, "and for the *further* purpose of *securing* said city against *all* loss or losses." This language carries the idea of a security additional to that provided for in the first clause. Is it satisfied by a construction which gives no further security? Or which merely declares the legal effect of the security already given? It comprehends all risks which the city may run upon the footing of its loan. It means full indemnity. Then follows, in language just as ample and as comprehensive, the provision for such indemnity. This is a priority or precedence in favor of the city, from the date of the loan or issue of bonds, over all other parties and all other forms of security subsequently contracted. It is a priority from the date of the "issues and loans," not from the date of the particular security. The actual *loan* or *issue* of credit is the very thing covered by the indemnity and

upon which the indemnity comes into operation. This construction is the only one which gives effect to the whole section, and at the same time leads to no repugnancy, and to no superfluous or illusory results.

It would seem that the City Council understood the section according to this construction. They first elected to take security by a mortgage of the road, and to this the company assented. Then, so far as appears upon its own motion, the council required an hypothecation of stock rather than a mortgage. Undoubtedly, as a means to reimburse the city promptly for advances in payment of interest, the substituted security was the best; but, as a permanent fund to hold for eventual indemnity against the payment of the principal to fall due after the lapse of thirty years, it was wholly untrustworthy, and subject to indefinite depreciation by the intervention of subsequent liens.

The City Council, it must be remembered, were exercising a strict statutory authority. They could dispense with nothing required by the statute, and exercise no discretion except that conferred by it. They could do nothing without the popular vote and do nothing contrary to it. But the popular vote authorized a loan with security by mortgage of the road. The exact question submitted and voted upon was, whether the city should issue the $600,000 to be secured in this way. The railroad company on its part expected also to give a mortgage. Now if we so construe this section as to hold that after the popular vote in favor of a loan which gave a lien on the road, that lien was lost by the act of the council in the substitution of another form of security, we take from the people who incur the liability the protection upon which they relied, and allow these public agents to commit a fraud on their constituents.

II. The 13th section of the General Railroad Law, then in force, supports our idea. The reader will please to turn back and read the language of its proviso, at page 278. Does he not perceive, on reading it, that the legislature intended to guard the interest of the city as carefully as that of the State, and to preserve the value of the stock held *in* or *against* a

company, by either the State or the city, from loss by subsequent liens? Stock held "*against*" a company, in contradistinction to that held *in* a company, can only mean stock held as a pledge or security, precisely as we assert that the stock is held by the city under the pledge in this case. If this proviso is operative, it must follow that the city stands first; for, to postpone it to the subsequent mortgages, not only impairs but destroys the value of the stock as a security. The reason for this peculiar favor to the city is evident. This city, the great centre of population and wealth, to which nearly all the roads of the State tended, and where a great number of them terminated, required such protection from the magnitude of the liabilities it would be expected to incur.

The 16th section of the act "to incorporate the Cincinnati Western Railroad Company," and authorizing the city to subscribe to *it*, passed February 10, 1851, and to whose language the reader will also turn back, is even more to our purpose. It requires the private stockholders to mortgage a sufficient amount of real estate, *in addition to the road and other effects of their company*, as security for the lending of the city credit.

The point which we make upon this act is, that it gives us a legislative construction of the 7th section of the act under which our loan was made. It stands free from doubt that the legislature considered the 15th section of this act identical with our 7th, as giving the city all the *corporate* security which could be given. But, beyond that, and lest it all might not give the *full indemnity* that was required, the private property of stockholders was also pledged. The individual security is declared to be cumulative, "in addition to the road and other effects of the company." Does not this carry irresistibly the idea of provision already made for a lien on all the corporate property, road, and everything else?

The only difference between the two acts is this, that, by the act of 1850—our act—the legislature was satisfied with all the corporate property as a measure of indemnity; whereas,

in the act of 1851, they were not satisfied with that alone, but required individual property besides.

III. The city has a lien upon the other corporate property through the pledge of stock.

When the stock was hypothecated, all the property of the company was free from any other pledge or incumbrance. Suppose at that time, and before any sale of the stock under the pledge, the company had been forced into liquidation—certainly the city would have stood in priority over stockholders—it would then have a priority not incident to common stock. It may be answered to this, that the lien would then arise upon the debt and in favor of the city as a creditor merely. But take it that other creditors were to be provided for. Would the city be entitled to no priority over them upon the footing of the pledge?

A surplus remaining after the mortgages are satisfied, or over property, if there is any, not included in those mortgages, would have no beneficial results. It is clear that if the mortgages are to be first satisfied everything will be swept away. The city claims, however, under this point a reversal, on the ground that the city stands now, as it stood when the pledge was made, prior in time and prior in lien upon the corporate property, to all other incumbrances. We assert that, under the circumstances of *this pledge*, *that* is its scope and effect, aside from the further provisions contained in the 7th section giving full indemnity; or that such is the effect of the pledge, *as a pledge*, according to all the provisions of this section, which, *quoad hoc*, give it that effect.

Finally. What is the stock of a road or of a bank but the effects and property of the road or bank? If the road or bank is prosperous, and makes great profits, those profits pass to the holders of the stock; they are accretions to or on their property. The shares are but the proportions in which the whole is held.

Messrs. Coffin, Evarts, and T. G. Mitchell, contra: If there exists a lien on the road in this case, it is one of a new kind;

a lien not by statute, nor by common law, but "a lien by argument." And though the bar generally would admit, if "liens by argument" can exist at all, that Mr. Stanbery is as able to create a good one as any man living, we must deny even to him the privilege of creating for them that which the parties had no design of creating for themselves.

The act of March 20, 1850, authorizes the city to contract with the railroad companies to which it may make loans, in reference to the character of the security to be given for them; and enumerates mortgages, transfers, or hypothecations of stock, and other liens and securities, real or personal, as those which may be thus agreed upon. This provision, it is conceded, would be sufficient to vest in the City Council the complete control of the subject of security but for the subsequent clause of the same section, enacting that the liens, mortgages, or other securities, so received, shall have priority over all obligations subsequently contracted by the companies, and over all other liens not acquired by other persons, prior to the issue and loan by the city of its bonds; which latter clause, it is asserted, makes the loans of the city, no matter what specific security may have been agreed upon, liens upon all the property of the respective companies, from the dates of the several loans. The construction would make the legislature provide that the city might elect to take whatever security it should select, real or personal, by pledge of stock, mortgage of specific property, or of any other description, but that the result must be in every event the same.

The statement of this argument appears to carry with it its refutation; and nothing but the eminence of the counsel by whom it is advanced entitles it to consideration.

The construction can be sustained only by rendering the whole provision as to the discretion vested in the City Council substantially inoperative, in order to rid the subsequent clause of the charge of being useless. In any event, too, it must be borne in mind that the clause relied upon does not in terms, nor even by implication, provide that the claims of the city shall be liens upon the roads of the companies,

nor upon any other specific thing whatever. The law provides that the City Council may stipulate for such security as it pleases; and it then, perhaps unnecessarily, enacts that whatever security it does take shall have priority over all other subsequent claims. It certainly does not provide that any security, by personal indorsement, or by pledge of stock, shall operate as a mortgage upon a railroad. And it would be an extraordinary judicial interpretation which would inject such a provision into the act, in order to shield a portion of its language from the charge of having been unnecessarily employed.

We all know that it is not an unusual thing to find in the legislation of this country unnecessary provisions and useless repetitions. And while the general principle of construction relied upon in this case may be admitted to be correct when there is a proper occasion for its application, the court—in order to avoid the conclusion that the General Assembly of Ohio has enacted that a lien shall have priority over subsequent liens—will not decide that nothing was meant by the expressed provision vesting the City Council with an absolute discretion; nor that when there was an intention to give a specific lien upon the tracks of railroad companies and their appurtenances, it was not thought necessary to mention, or even to allude to, that species of property.

The idea is presented by opposite counsel, though not largely or very specially enforced, that whatever discretion was vested in the City Council was exhausted by the passage of the resolutions (see *supra*, page 279) submitting the question of loans to the voters of the city; that the acceptance by the railroad company of the terms of these resolutions, one of which, it is argued, stipulated for a mortgage of the road as security, completed a contract for a lien upon the road; and that after the vote of the people, and the completion of a contract in pursuance of it, the City Council had no power to change the security.

But how can the power, explicitly conferred upon the City Council, to decide upon the security to be exacted, be

exhausted before the passage of the ordinance for the issue of the bonds to be lent? It was made the duty as well as the right of the council to decide upon this question; and even if there had been submitted to the people the question of making a loan, on the faith of a particular indemnity, the council would by no means have precluded itself from insisting upon what was deemed a better security, before making the loan. If the question were open, whether the security taken was in fact superior to the one originally proposed, it would not be difficult to show that it at least was not inferior; since a mortgage upon a merely hypothetical road, would not only be useless until the road was constructed, but would itself be an obstacle in the way of such construction. But that question is not open. The properly constituted authorities of a municipal corporation, as well as the managers of any other corporate body, may bind the corporation by acts in contravention of their plain duty, and even in direct violation of law, whenever they have any power to act at all in the premises. "Where the directors of a company," says an English case,* "do acts in violation of their deed, in a matter *in which they have no authority*, such acts are altogether null and void. But when acts to be done are within the power and duty of the directors and are neglected, and thereby third parties are damaged, neither a court of law nor of equity, will allow the company to take advantage of that neglect. . . . . If a company neglect a form or an obligation, which they could and ought to perform, they cannot afterwards raise an objection of that want of form, as against a person with whom they have been dealing."

If it were true, however, that the City Council had no power to dispense with the original provisions of its resolutions, and that those resolutions required from this company a mortgage, and that the city remained entitled, as against the railroad company, to the mortgage at one time contemplated, the fact would nevertheless remain, that no mort-

* Bargate v. Shortridge, 31 English Law and Equity, 44.

gage was ever executed in pursuance of this agreement; and no claim based on one could be asserted, as against the holders of mortgages regularly executed. The city, of course, is not here attempting to deny the validity of its bonds.

II. Support of the kind desired by the city is thought to be derived from other statutes; the general railroad law, for example, and the act to incorporate the Cincinnati Western Railroad. This mode of interpreting statutes,—a mode by which one statute is made to mean, that which some other, and not *it*, enacts—is a dangerous mode of expounding laws. As a means of *interpreting* any act, it is hardly allowable. With an example set, we may, however, perhaps refer to statutes to show that when the legislature of Ohio has meant to create a specific lien on anything, it knew the proper words by which to do it. Thus by an act of March 24, 1837,* "To authorize a loan of credit by the State of Ohio to railroad companies," &c., the legislature, after enacting that certain railroads shall be entitled to a loan of credit from the State equal to one-third of their authorized capital, and that certain officers of the State shall deliver negotiable scrip or transferable certificates bearing interest of the State to every such company, goes on to say:

"The receipt of such scrip, or any portion of scrip, by any railroad company, shall operate *as a specific pledge of the capital stock, estate, tolls, and profits* of such railroad company, to the State of Ohio, to secure the repayment of the sums advanced."

Indeed in all cases where lien by statute is meant to be created the legislature has taken care to express the intention to create the lien in clear and explicit terms. For certain trespasses committed by the navigators of canal-boats, the party injured, for the damages sustained "shall have *a lien*" upon the boat.† For labor or materials furnished, &c., the party "shall have *a lien*."‡ Mutual insurance companies insuring buildings, for payment of the assessments, "shall

* Acts of a General Nature, of the State of Ohio, Columbus, 1837, p. 76.
† Swan & Critchfield's Revised Statutes, 224. ‡ Id. 888.

have a lien thereon."* Ships and steamboats are made liable, &c., and "such liability shall be a *lien* thereon."† "The *lien* of the State," for taxes on real estate, &c.;‡ and so of many others.

III. As to the stock. Mr. Stanbery argues that when the stock was pledged all the property of the company was free, and then, if the company had been forced into liquidation, that the city would have stood in priority over stockholders, —it would then have had a priority not incident to common stock. This we must deny. The city we submit never had priority over other stockholders; it never had any other right than that common to all the stockholders, and if the company, after obtaining the $600,000 from the city, had been unable to build the road and had been dissolved and a distribution of the assets had taken place, the city would have had to suffer like other shareholders.

Finally, the distinction between the property of the corporation and the rights of the stockholders in the corporation sufficiently settled is disregarded by the last head of argument by the other side.

A corporation may be seized of acres of real property; deal largely in real estate; possess goods and money to any amount, but no individual stockholder has any direct interest in the *corpus* of the property itself. The property of the corporation belongs to it, and to it only. The interest of the stockholder is a share of the net produce of all the property of the corporation, brought into one fund. The stockholders are as distinct from the corporation as any other persons who are not stockholders. The money obtained from the stockholders belongs to the corporation itself; the stock to the shareholders.§

Railroad shares are not an interest in lands. Whether they are goods within the statute of frauds or not, the cases do not agree. They resemble choses in action; have been

* Swan & Critchfield's Revised Statutes, 856. † Id. 258. ‡ Id. 1459

§ Bligh v. Brent, 2 Younge & Collier, 295; Bradley v. Haldsworth, 3 Mecson & Welsby, 422; State v. Franklin Bank, 10 Ohio, 91, 97; Johns v Johns, 1 Ohio State, 351; Bridge Company v. Sawyer, 6 Exchequer, 507.

held to be choses in action. They are in truth, merely, the evidence of a right to have a share of the profits of the business of the corporation.*

The city, then, by a mere pledge of these shares of the stock of this company, obtains no lien upon the railroad.

Mr. Justice NELSON delivered the opinion of the court.

There is no doubt but that every part of this transaction was within the competency of the City Council on the one side, and the railroad company on the other, as derived from the act of the legislature of Ohio, already referred to, of the 20th March, 1850, and was valid and binding upon both the parties. The seventh section of this act confers the authority in express terms. The City Council is authorized to contract with the railroad company, to secure, by mortgages, transfers, or hypothecations of their stock, or by such other liens or securities, real or personal, as may be mutually agreed upon, for the payment of the amount of the principal of the bonds as they become due, and for the reimbursement of any interest that might be paid by the city.

The question in the case is, what are the rights acquired by the city, on the one hand, and obligations assumed by the railroad company, on the other, by this arrangement?

If we look simply to the contract between the parties, it is impossible to entertain any doubt about them. The city holds $1,000,000 in the stock of the company, as a security for the loan of $600,000 in city bonds, with a power of sale of the stock upon the terms mentioned. The whole transaction consists in a loan of bonds and a pledge of stock.

It is argued, however, that this seventh section of the act of 1850 impresses upon the transaction an effect and operation over and beyond the mere rights and obligations arising out of the contract; that the section transmutes the pledge of stock into a lien or mortgage upon the road and fixtures of the company, and makes it not only a charge upon them but a charge prior in date to the second, and even the first mortgage; that, in effect, the pledge overrides all liens o

* Mechanics' Bank v. New York and New Haven R. R., 3 Kerman, 627

incumbrances upon the road and fixtures, whether prior or subsequent in time, and postpones them to this alleged statute security of the loan of the city bonds. Certainly a statute that can have such a peculiar and strikingly inequitable effect and operation, should be very explicit and positive, in order to obtain the assent of a court of law or equity.

The lien is supposed to be given by the latter clause of the section, which is, in substance, as follows:

"And for the further purpose of securing said city against all loss or losses which the same may suffer, whether by payment of the principal or interest, or any damages arising therefrom, that the above liens, mortgages, or other securities shall have priority or precedence of all claims or obligations subsequently contracted by such company, and over other liens, securities, or mortgages which were not duly entered into between said company and other persons, before the respective issues and loans."

It will be remembered that the first clause in the section gave to the City Council an option as to the security they might take for the advance of the bonds. They might take mortgages, or hypothecations of stock of the company, or such other lien or security, real or personal, as the parties should mutually agree to between themselves. The liens and securities, therefore, real or personal, that the City Council might require, depended upon their own views of what would be best for all the parties interested in the enterprise of building the road. They could have exacted a mortgage upon the road or fixtures, or both, or be satisfied with personal security, such as the hypothecation of stock. They did, at first, decide in favor of a mortgage on the road, but soon afterwards changed their opinion in favor of the hypothecation of stock—exacting a $1,000,000 of stock for the $600,000 in their bonds. Now, "the above-described liens, mortgages, and securities," referred to in the subsequent clause of the section, and to which priority and precedence are given over claims and obligations subsequently entered into, is to be taken distributively; that is, if the City Council should stipulate for a lien by way of mortgage, upon the road, or upon personal property belonging to the

company, or which might be acquired in the future, such liens or mortgages should have priority and precedence over claims and obligations subsequently contracted by the company.

The only answer to this view is, that it makes the clause a work of supererogation, as this would be the legal effect of the lien itself. That is true. The clause would be but declaratory of the law as it stood. This, however, is not a strange circumstance in legislation. A large portion of the modern codes is but declaratory of the common law as expounded by the courts. We prefer this interpretation to the one that gives a lien against the stipulations of the parties, and where both were free to enter into them as authorized by a previous clause of the same section. Under this liberty, given to the City Council and the company, the former rejected the lien upon the road by mortgage, preferring the personal security by a pledge or hypothecation of the stock.

The first clause of this section would be quite as idle and absurd a piece of legislation, which conferred upon the parties the authority of agreeing upon their own terms as to the nature and character of the security for the loans, as the latter, if, by the latter clause, whatever might be the security agreed upon, it must operate as a mortgage on the road, and have precedence over all others. Why give this choice of securities, if this would be the result? There was no necessity to stipulate for a mortgage on the road, if the statute gave the lien without it; nor propriety or sense in the choice between a mortgage and the pledge of stock, if a lien on the road followed either security.

The thirteenth section of the general law incorporating railroads, referred to as helping out this lien, we think, received its proper answer in the court below, as not applicable to this company; and the same in respect to a clause in the act of February 10, 1851, incorporating the Cincinnati Western Railroad Company.

We think the decree of the court below, against the claim of the city, was right, and should be

AFFIRMED.

HAVEMEYER v. IOWA COUNTY.

1. The case of *Gelpcke* v. *The City of Dubuque* (1 Wallace, 175), affirmed and enforced; and the doctrine reasserted, that if a contract, when made, was valid by the constitution and laws of a State, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation.
2. Where the judges of the Circuit Court certify a division of opinion to this court for its judgment, this court will not return an answer unless the question raised involve a distinct legal point, and sufficient facts are set forth to show its bearing on the rights of the parties. Hence no answer will be given to a proposition merely abstract.

THE constitution of Wisconsin, adopted in 1848, provides that "*no general law shall be in force until published;*" and an act of 1852 makes it the *duty* of the secretary of state and the *attorney-general* to divide all the laws passed by the legislature into two classes, and directs that each class shall be published in a separate volume; that the first class shall include laws of a *general nature;* the second class all laws which are not included in the first class; and that "the title-pages of the respective volumes shall express whether they contain acts of a *general nature* or the *private and local* acts," &c.

Subsequently to the passage of this act of 1852—that is to say, in *March*, 1853—the legislature of Wisconsin passed an act authorizing counties through which a certain railroad should pass—Iowa County being one of the counties—to aid its construction by subscribing to its stock and issuing bonds of the county to pay for it. But by the terms of the act, no bonds were to be issued except a majority of the electors should authorize the issue by vote at an election, the mode of holding which and the duties of the county officers in regard thereto were prescribed in the statute.

This act of *March*, 1853, coming, soon after its passage and in ordinary course, before the secretary of state and attorney-general for classification, they decided that it was not an act of a general nature, but was a local act, and classified it accordingly. *No volume containing the act was published till October*, 1853.

Between these two dates—and between the time, of course, when the secretary of state and the attorney-general classified the act as a local act, and the time when the act was "published" in a volume—the election, which the act itself authorized, was held, and the bonds were issued by the county. A number of them passed into the possession of one Havemeyer, and the interest on them being unpaid, he now brought debt in the Circuit Court of Wisconsin to obtain payment of it.

On the trial, the judges of the Circuit Court were divided in opinion, and sent here a certificate of division accordingly, on the following questions:

1. Whether the act of March, 1853, authorizing the subscription, and under which the bonds were issued, is a "general law" within the meaning of the constitution of Wisconsin?

2. Whether the said act, not being published as a general act, and having been first published, after its passage, in the volume of local and private acts, in October, 1853, and *after* the issuing of the bonds, is not such an exercise of power by the State government or legislature, showing that the act is not a general act, and is binding on the courts?

3. Whether, if the said act is such a general law, *any* act or omission of the said county, its officers or electors, short of an election under the act, after the act was published in October, 1853, will render the bonds valid, or estop the defendant from questioning their validity in the hands of *bonâ fide* holders?

The case came here, of course, under the act of Congress of 29th April, 1802, which authorizes a decision of *this* court upon it, "whenever any question shall *occur* before a Circuit Court upon which the opinions of the judges shall be opposed," and a certificate of it is sent up.

There were no recitals on the bonds, and the record disclosed no great deal more than the act authorizing the election, subscription, issue, and the fact that these had all been made, and that Havemeyer was owner of the instruments now due and unpaid.

The difficulty of resolving the question below was caused

in part, perhaps, from a conflict in the decisions in the Supreme Court of Wisconsin, as to the character of the act of March, 1853, or of others just like it. The late decisions of that tribunal, beginning with *State* v. *Leon*, A.D. 1859,* followed by several others afterwards,† held the acts to be general laws; herein departing from the view taken, A.D. 1858, in *Hewett* v. *The Town of Grand Chute*,‡ where a contrary idea was assumed as of course. And how far this departure from precedent was owing to a truer conception of the nature of general and particular laws, and how far to the fact, that the judiciary of Wisconsin was a body elected by popular suffrage at short intervals, and which might have come to the bench suffused with the feelings and ideas and wishes of a constituency wishing to disown an obligation which it had been found much easier to contract than to pay, was a matter not seen perfectly alike by all sides.

Mr. M. H. Carpenter, for Havemeyer, holder of the bonds.

The first and second points may be argued together. The act authorizing the subscription is not a general law, and does not require to be published in order to be valid. The distinction was long since truly taken by an authoritative writer of the English law,—a no less authority than Chief Baron Gilbert. Under the title of "General and Particular Laws," he says in his book on evidence:

"The distinction between a general and a particular law is, whatever concerns the kingdom in general, is a general law; and whatever concerns a particular species of men, or some individuals, is a special law."

It is impossible to cite higher authority, though here found in a text-book, and unnecessary, therefore, to cite

* 9 Wisconsin, 279.

† Subsequent decisions are as follow: In re Boyle, 9 Wisconsin, 265, decided A.D. 1859; Clark v. City of Janesville, 10 Id. 136, decided A.D. 1860; Town of Rochester v. The Alfred Bank, 13 Id. 432, A.D. 1861; Berliner v. Town of Waterloo, 14 Id. 378, A.D. 1861.

‡ 7 Wisconsin, 282.

other. The same distinction, however, it may be said, runs through all judicial decisions. It has been declared in Wisconsin itself, and nowhere more emphatically. In *Hewett* v. *The Town of Grand Chute*, decided in 1858, long after these bonds had been sold, the question was not even thought of being raised. The action was on bonds issued, by the town, in pursuance of an act almost identical with this one. The question was, whether, *being* a private act, the act was properly pleaded? That it *was* a private act, no one was hardy enough to deny. The difficulty of the case would have disappeared had the act been a public one. The Supreme Court of Wisconsin say, and this court will specially note their language:

"The cause of action is founded upon a *private statute;* or rather upon certain instruments or contracts in writing, which derive their validity from such *private statute.* By the common law it was necessary to set out such statute in the declaration, otherwise the court would not take notice of its provisions: *unlike,* in this respect, a *public statute,* of which the court was bound to take judicial notice, though the latter were not pleaded. But section sixty-nine of the Code of Procedure provides as follows: 'In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its *title* and the day of its passage, and the court shall thereupon take judicial notice thereof.' In this case the plaintiff in his complaint did refer to the statute from which his right was derived, by reference to its title and the day of its passage, and he thus brought the whole statute within the judicial knowledge of the court," &c.

This view—a unanimous one of the old Supreme Court of Wisconsin—the view also taken previous to it by the secretary of state and the attorney-general—remained unquestioned and without doubt as to its being true law, until 1859, when the tax-payers woke up to the truth that it is easy to contract debt, but not always easy to pay it, and a majority of our Supreme Court,—three judges elected by the people—discovered in *State* v. *Leon*, the saving fact that such statutes are of a "general nature;" declaring a few years

later* that an election before the publication authorizing the issue, was "an idle act, wholly unauthorized and of no importance whatever." This departure from precedent, is the consequence of a judicial tenure for less than good behavior; a bench of justice elected as that in Wisconsin, at short terms, by general suffrage.

But it is our privilege to come to this tribunal, where the "*arbitrium popularis auræ*" is unknown, and which neither takes up nor lays down the scales of justice at its command. To this court, then,—this "more than Amphyctionic council,"—we appeal. We rely upon the important doctrine here asserted at December Term, 1864, in *Gelpcke* v. *The City of Dubuque*.† The court in that great case,—argued thoroughly, deliberately considered, solemnly adjudged,—says:

"The sound and true rule is, that if the contract when made was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of the legislature, or decision of its courts altering the construction of the law. The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. To hold otherwise, would be as unjust as to hold that rights acquired under a statute must be lost by its repeal."

Our case falls within this principle. The bonds were issued in 1853, were disposed of, and were circulating in the market with full approbation of the legislature; the people of the county; every department, including the judicial tribunals of the State, until the year 1859; and during all these years, in which the bonds were made and sold, they were valid and legal contracts, and would have been enforced by our State courts, upon the ground that the acts authorizing their issue were *private and local laws and were in force from their passage without publication.*

* Clark v. City of Janesville, A. D. 1860. † 1 Wallace, 175.

It is unimportant in view of the decision of this court in *Gelpcke* v. *Dubuque*, whether the late decisions of our State court give or do not give the sounder construction of our constitution. In subsequent contracts this court may regard them as giving that which is the sounder; but the action of the State, in its legislative, administrative, and judicial departments, during the period of the making and negotiating of *these* bonds, must furnish the rule to be applied in all suits founded upon *them*, whether, in the opinion of this court, that action was right or wrong. It was the law of the contract and cannot be changed without destroying the obligation of what, when made, was valid and binding.

3. Assuming, as we do, that the court must take the view which we present on these two points, we are not solicitous as to the answer which it may give on the last point certified. If any answer is given, it must follow the answer to the others.

Mr. Ryan, contra: Mr. Carpenter refers to the distinction which has passed into technical law between general laws and particular or special laws. But the act of 1852, directing a classification, does not use the terms "general law," but uses another expression, "acts of a *general nature*," which it distinguishes from "private and local acts." This shows that it was not the intention of the legislature to classify its statutes by their legal character, but according to the public interest in having access to them. The first class is to contain all "acts of a general nature," but not all "general acts." The second class is to contain all general acts which are local, all charters which are public, and all private acts. It is inconceivable how a municipality, with a changing population, amounting from hundreds of political units to hundreds of thousands, and capable of including, and almost inevitably including, property of strangers affected by all legislation having relation to it, could be bound by a private act. If the act before the court can be dealt with as a private act, it is not seen on what distinguishing principle, absurd as the proposition is, all municipal law might not be found in private statutes.

The counsel would seem to rely on the classification made by the secretary of state and the attorney-general, which two officers regarded the act as one of a private nature, and classified it accordingly. But the question whether a statute is public or private, is judicial. No question of interpretation is more purely so. The constitution of Wisconsin, in common with most of our American constitutions, exhausts the judicial power; and it is not competent for the legislature to vest it in persons or officers, other than such as the constitution prescribes. Here, the duty of classification is given to ministerial officers. And their action is not only not binding, but is of no weight in the courts. It is for the judicial department to declare *their* acts right or wrong; not for *them* to impose judicial construction upon the courts.

Confessedly, every decision in the highest courts of Wisconsin since the case of *State* v. *Leon*, including that one, has been that these acts are general laws. In *Hewett* v. *The Town of Grand Chute*, whose language is extracted and presented as conclusive on the other side, and to which opposite counsel invites specially the court's attention, the matter was not in issue. Attention was not directed to it. *Assuming* the act to be a private one, the court held it to be rightly pleaded. That is all. The decisions then are unbroken.

There is a uniform and settled rule of adjudication upon the constitution and laws of the State; followed by all the courts of the State, and, in the State courts, recognized and admitted by the bar of the State.

In questions of State institutions and policy, not conflicting with the Federal Constitution, the several State courts are the appropriate tribunals to give the rule of decision; and this court has, therefore, from the earliest times, with high judicial comity and political sagacity, followed the rule of State decision upon State statutes whenever such a rule was to be found clearly established. "This court has no authority," was the language of a case from Pennsylvania, "to revise the act of that State upon any grounds of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the

State." The quotation is the law of our controversy. And it will be a calamity, not only to the judicial, but to the political history of the country, if time should witness the departure of this court from its ancient practice of just and conservative forbearance, and its regard of the State rule of decision on questions of purely State law. With this long-settled doctrine of the court the action of the people and courts of Wisconsin is not open for argument. It is enough that the people of Wisconsin have formed their constitution as they have, and that the Supreme Court of the State interpret it as they do. That is their right solely. The State having been admitted into the Union under a constitution approved by Congress, and not repugnant to the constitution or laws of the United States, no department of the Federal government has power to set it aside, to treat it as a nullity, or to destroy it by interpretation, in matters properly subject to it.

The third question certified, is abstract. It calls for the opinion of this court, whether *any* act or omission of the county, its officers, or electors, under the condition stated, could render the bonds valid or estop the defendant. If any such act or omission could have such an effect, that would depend upon the character of the particular act or omission, the time of its occurrence, the persons by whom and with whom done or omitted and their authority, and generally the circumstances under which done or omitted. All these conditions rest, in the question, in supposition. There are no recitals in the bonds themselves. There is therefore nothing in the record bearing on this question. The record discloses only the facts of the election, the execution of the defendant's bonds, and the exchange or issue of them. It was not contended in the court below, and it is not here, that these facts have any tendency, of themselves, to render the bonds valid or to estop the defendant from questioning their validity, if the act was not in force. The question certified did not "occur" in the court below, but only suggested itself as something which might occur; it did not *meet* the judges, and was not involved in any decision they were

called upon to make. It is not an occurrence, but only a supposition, and not within the act of Congress. The court below, therefore, had no jurisdiction to certify it here; and this court has no jurisdiction to decide it.

Mr. Justice SWAYNE delivered the opinion of the court.

In the view which we have taken of the first two questions which are presented by the certificate of division for our consideration in this case, they may be properly considered together. They are:

1. Whether the act in question is a general law within the meaning of the constitution of Wisconsin.

2. Whether the act not being published as a general act, and having been first published after its passage in the volume of local and private acts, and after the issuing of the bonds, is not such an exercise of power by the State government or legislature, showing that the act is not a general act, as is binding on the courts.

The secretary of state and the attorney-general decided that the act was not a general law, but a local act. This decision, as to the character of the act, was made by those upon whom the law devolved that duty. It is not suggested that the decision was not fairly made, nor is it denied that it was in accordance with the rule which had prevailed down to that time, and which prevailed subsequently until the Supreme Court passed upon the subject, in the case of the *State* v. *Leon*, which was decided in the year 1859.

This action is conclusive as to the executive department of the government prior to that period, and it is entitled to the greater weight from the fact that the highest law officer of the State participated in the decision.

The subject came incidentally under the consideration of the Supreme Court of the State, in *Hewett* v. *The Town of Grand Chute*. The question in that case was, whether a statute, in all respects identical with the one under which these securities were issued, as regards the questions before us, was pleaded as a private act should be. The question whether *it was a private act* was not made in the case. That

was impliedly conceded by the counsel on both sides. The language of the court in this case has been quoted and commented on at the bar.* We need not repeat it. It presents a clear judicial recognition by the highest court of the State in accordance with the previous determination of the executive department. The executive and judicial departments were in harmony upon the subject. This case was decided in 1858. It shows the understanding of the bar and the bench down to that time.

Prior to that period no intimation had been given by any department of the government that such statutes were to be regarded otherwise than as local in their character, and broadly distinguished from general laws within the meaning of the constitution.

The subsequent adjudications in the *State* v. *Leon*, decided in 1859, and the cases which followed it, hold that such statutes are "of a general nature," and have no validity until published. But being long posterior to the time when the securities were issued, they can have no effect upon our decision and may be laid out of view. We can look only to the condition of things which subsisted when they were sold. That brings them within the rule laid down by this court, in *Gelpcke* v. *The City of Dubuque*. In that case it was held, that if the contract, when made, was valid by the constitution and laws of the State, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation. This rule was established upon the most careful consideration. We think it rests upon a solid foundation, and we feel no disposition to depart from it.

Whether the statute here under consideration is intrinsically general or local in its character, is a question which we have not found it necessary to consider.

The third question presents merely an abstract proposition. No facts are disclosed in the record which show that it has arisen or can hereafter arise in the case. Under such

* See *supra*, p. 298.

circumstances it is the settled practice of this court to decline to answer. It is necessary that the question should involve a distinct legal point, and that sufficient facts should be set forth to show its bearing upon the rights of the parties.* In this case all the facts relied upon as operating to ratify should have been set forth. Any point of disagreement between the judges relating to the subject would then have appeared in its proper light and could have been definitely answered. As the question is presented the answer, if given, would be equally general, and, like the question, a mere abstraction, which could subserve no useful purpose in the further progress of the cause.

The answer to the first and second questions certified up will be that, under the circumstances, the statute referred to must be held in this case to be a local act, and not a *general law*.

To the third question, for the reasons stated, no answer will be given.

ORDER IN CONFORMITY.

[See, on the last point of this case, *supra*, p. 250, *Daniels* v. *Railroad Company*.—REP.]

MINING COMPANY *v.* BOGGS.

1. In a suit to recover mineral lands on the Pacific coast, with the mines therein, an allegation of record, of prior possession of the land for the purpose of taking out the minerals, without an allegation that such possession is had under authority, or by some treaty or statute of the United States, does not give this court jurisdiction to re-examine the case under the 25th section of the Judiciary Act of 1789.
2. Nor has the court jurisdiction where the decision below is that, as a *matter of fact*, no such license exists; the courts of the State, to whose highest court of law and equity the writ of error is sent, having the power, under the constitution of its State, to decide both law and fact upon submission of the case by the parties.

BOGGS, lessee of Frémont, brought a suit in one of the inferior State courts of California against the Merced Mining

* Crooker et al. v. Newton, 18 Howard, 581; United States v. The City Bank of Columbus, 19 Id. 385.

Company, for the possession of certain *mineral lands*, with the *mines therein*, situated in Mariposa County.

The case, according to a frequent practice in the courts just named, was submitted to the court, both as to matters *of fact* and matters of law, without a jury. The recovery was resisted on several grounds. Among them was possession of the land—prior to any claim of the lessor of Boggs—"according to the *usages and regulations* established and in force in the *mining district* within which it was, for the purpose of extracting the gold from the rock;" by which prior possession of the said mineral lands and appropriation of the quartz veins therein, the mining company asserted itself to have acquired a perfect right thereto.

The pleadings nowhere developed more fully than as above the nature of the title thus set up by way of defence; nor indeed did anything else in the record brought here; though as matter of fact it was no doubt, the reporter supposes, meant to be rested on what was a subject of general knowledge; to wit, that the United States had impliedly, and to a greater or less extent, allowed persons to take possession of and to work the mining lands of the Pacific coast, though such persons had no patent for them from it.* Under an agreement, too, between the attorneys in the case, the defendant had the right to set up in defence any matter which could be the subject of a bill in equity.

The court in which the suit was brought found, as matter of fact, that the premises sued for had been granted by the United States to Boggs's lessor; and that, in virtue of his lease, Boggs became and still was owner of them; that the Mining Company, defendant in the case, was in possession of them, without the consent and against the will of the plaintiff, and was guilty of the trespass alleged.

It found, also, that in May, 1851, prior to the date of the lease to Boggs, the premises were vacant; that the Mining Company entered upon them under one Moffat; but it was not shown that the said Moffat himself had any title; but,

* See Strong *v.* Sparrow, *supra*, pp. 99, 100, 104; and the Appendix, No. 1.

on the contrary, the premises were then the public domain of the United States, except in so far, &c.; that the Mining Company commenced improving the premises for mining purposes in 1851, and had ever since used and occupied them for such purposes, "pursuant to the *mining regulations* prevailing in the district," and had made improvements and expenditures to the extent of more than eight hundred thousand dollars. But the court found, also, that the plaintiff was not estopped from asserting his title, and, on the whole case, found in his favor. Judgment went accordingly for him.

The case then went up to the Supreme Court of the State. That court, in its *opinion* (which was not, however, any part of the record), recapitulating the case, and noting that one ground relied on to defeat the recovery was "a license from the government to enter on the premises and extract the gold,"—thus proceeded:

"If the company has a right to the possession and use of the land as against its true owner, for the purpose of extracting the precious metals, it must be upon the ground that the mineral does not pass with the soil as an incident to it, but belongs either to the United States or to the State of California, and that the defendant has an effectual license to enter on the premises and extract them. . . . . .

"Assuming, for the purpose of this case, that the mineral belongs to the United States, has the defendant any such license?

"It is sometimes said, in speaking of the public lands, that there is a general license from the United States to work the mines which these lands contain. But this language, though it has found its way into some judicial decisions, is inaccurate as applied to the action, or rather want of action, of the government. There is no license, in the legal meaning of that term. A license to work the mines implies a permission to extract and remove the mineral. Such license from an individual owner can be created only by writing, and from the General Government only by act of Congress. It carries an interest in the land, and arises only from grant. The mineral, whether a distinct possession or otherwise, constitutes part of the realty, as much so as growing timber, and no interest in it can pass except in the

ordinary modes for the disposition of land. It is under the exclusive control of Congress, equally with any other interest which the government possesses in land. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. And it is from its want of specific action, from its passiveness, that the inference is drawn of a general license. The most which can be said is, that the government has forborne to exercise its rights; *but this forbearance confers no positive right upon the miner which would avail as a protection against the assertion of its claims to the mineral.* The supposed license from the General Government, then, to work the mines in the public lands, consists in its simple forbearance. Any other license rests in mere assertion, and is untrue in fact, and unwarranted in law."

That court accordingly affirmed the judgment; and the Mining Company brought the case here, considering that it fell within the 25th section of the Judiciary Act of 1789, which gives a right of re-examination in this court in cases where there has been drawn in question, in the highest court of law or equity in a State, "the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity;" which statute, however, also enacts that "no other error shall be assigned or regarded as ground of reversal in any such case as aforesaid than such as appears on *the face of the record, and immediately respecting* the before-mentioned questions of validity or construction, &c."

Mr. David Dudley Field, representing here the defendant in error, having moved to dismiss the case, as not within the provision of the statute, and stated fully the grounds of his motion*—to wit, that it must clearly appear on the record that an *authority* exercised under the United States was distinctly presented—that it "did *arise and was* applied"—and that the decision was against the authority so set up; and

* Citing Day v. Gallup, 2 Wallace, 97; Towle v. Farney, 1 Black, 350; Hoyt v. Shelden, Id. 520; Maxwell v. Newbold, 18 Howard, 515; and earlier precedents.

arguing that a mere forbearance by the government to assert rights was not an "authority" to take the minerals—*Mr. Reverdy Johnson* was heard *contra:*

He contended that, by the laws of Mexico, from which this region came to us, a grant of the mere land did not carry the minerals under it; that the law of England was apparently the same as respected the government, and that this appeared by the *Case of the Mines* reported by Plowden;* that in the case at bar, the grant by the United States to Boggs's lessor, Frémont, had passed no metals; and that, so far as Frémont was concerned, these still belonged to the United States. He referred to the fact, as well known, that a special system of law had grown up in the mining States, by which possessory claims, though perhaps, in a view purely abstract, trespasses against the United States, had been long impliedly protected and upheld by the National Government, and had recently been even the subject of protection by statute.† This court had also recognized the value of such claims independently of the statute. In *Sparrow* v. *Strong*‡ the court said it was impossible to shut our eyes to the public history which informs us that, under Territorial and State legislation, and "not only without interference by the National Government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." It was of course under this implied *authority* from the government that the Mining Company rested their case, as to one of its defences, in the court below. The lands were confessedly mineral lands. The suit was for the mines as well as for the lands.

The company asserted, among other things, that they were

* Page 310.

† "No possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to such title, shall be affected by the fact that the paramount title to the land on which said mines are, is in the United States; *but each case shall be adjudged by the law of possession.*" (*Act of February* 27, 1865, 13 Stat. at Large, 441.)

‡ *Supra*, 104.

in prior possession, "according to the *usages* and regulations established and in force in *the mining district, for the purpose of extracting gold from the rock;*" plainly making it to be understood that they were there in the only way in which they could *so* be there, to wit, under the authority of the United States; whether a permissive authority or one by direct grant, it mattered not. Either was enough to make the party there rightfully. The court below decided against the authority so set up under the United States. The decision was as matter of law; or, to use the court's own language, there was "no license within the *legal meaning* of that term." Nothing short of an act of Congress, the court considered, could constitute a license; that forbearance was all that existed here, and that forbearance was not enough; it alone conferred "no positive right." The decision, therefore, was plainly on law as well as on fact; or on law alone, fact being assumed.

The CHIEF JUSTICE delivered the opinion of the court.

No question is raised by the pleadings, of which this court has jurisdiction upon writs of error to the Supreme Court of California, unless by the allegation of prior possession of this land for the purpose of taking out the minerals. But this allegation does not set up any authority exercised under the United States in taking such possession, nor any treaty or statute of the United States, in virtue of which it was taken. Nor does it anywhere appear from the record that the decision of the State court was against the validity of any such authority, treaty, or statute. The case brought before us is, therefore, wanting in the requirement made essential to our jurisdiction by the 25th section of the Judiciary Act.

If we were at liberty to look into the opinion of the court for the purpose of ascertaining what questions were made on the argument, and decided by the court, we should find that, upon a liberal construction of the stipulations of counsel, the defendants were allowed to insist that they were warranted in their possession of the lands, for the purpose

of extracting the minerals, by a license inferred from the general policy of the State or of the United States, in relation to mines of gold and silver and the lands containing them.

We doubt whether such a claim, even if made in the pleadings, would be such an allegation as would give jurisdiction to this court.

However that may be, there was no decision of the court against the validity of such a license. The decision was, that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law.

It is the same case, in principle, as would be made by an allegation in defence to an action of ejectment, of a patent from the United States with an averment of its loss or destruction, and a finding by the jury that no such patent existed, and a consequent judgment for the defendant. Such a judgment would deny, not the validity, but the existence of the patent. And this court would have no jurisdiction to review it.

The writ of error must, therefore, be

DISMISSED.

THE GRANITE STATE.

1. Where the question of fault in a collision lies, on the one hand, between a boat fast at a wharf, out of the track of other vessels, and moored, in all respects of place and signals, or want of them, according to the port regulations of the place, and, on the other, a steamer navigating a channel of sufficient width for her to move and stop at pleasure, the fault, under almost any circumstances, where there is no unusual action of the elements or other superior force driving her to the place of collision, will be held to be with the steamer.

Hence a steamer which, in going in the dark from a broad channel into her dock, runs—though in an effort to avoid other steamers coming out of *their* docks—against a barge moored at a wharf according to the port regulations, is responsible for the collision. Nor is it an excuse that the barge was without masts, lay low, and owing to her color was not

Statement of the case.

visible in the dark till you were close by her; nor, if the port regulations of the place do not require them from vessels moored at wharves, that she was without both light and watch.

2. The sum which it will take to repair her is not an incorrect rule of damage, in case of injury from collision to an old barge of a peculiar structure and capacities of usefulness, and from these causes not having any established market value in the particular port where she is injured.

THE steamer Granite State, plying between Hartford and New York, arrived before daybreak of a December morning in the Hudson, with passengers and freight, and was in the act of entering her dock between the city piers Nos. 24 and 25. *Across* the end of Pier No. 23 lay an old and pretty rotten barge,—the Ranger. The barge's pier extended many feet further out in the river than the piers in the immediate vicinity above and below. The barge had no masts, and her hull lay below the top of the pier; that is to say, the pier was higher than the vessel, as she lay in front of it. She was well secured in her place, but had on board no watch or light; the laws of the port of New York, as was proved, not making it obligatory on vessels of this sort *moored at wharves* to have either, though vessels at the wharves not unfrequently had them both. The barge had been taking in loading from the dock; but the night coming on before she was fully laden, she lay where she was to complete her cargo in the morning. Her deck was covered with some old and dirty linen of a yellowish hue, and not unlike the color of the wharf at which she lay. By the rules of the port she had a right to be where she was. The morning was dark and rainy, and a pretty strong wind from the southeast; the tide the last of the ebb. The steamer came down on the Brooklyn side, and at about the usual point swung round towards the New York shore, and straightened up with a view to work into her berth. As she was approaching it, a *Williamsburg* ferry-boat came out of *her* slip, which was between Piers Nos. 25 and 26, the next above the berth of the steamer. The Granite State stopped and backed obliquely into the stream. At this moment, out shot from her slip, between Piers Nos. 21 and 22—below where the

barge lay—a *third* steamer, a *Fulton* ferry-boat. To avoid *her*, the Granite State, being now clear of the other ferry-boat, went "strong ahead," so as to get into her slip as fast as possible. Suddenly she discovered the barge, but not until she was within sixty feet of it; too late to arrest her headway, under more or less force of which, notwithstanding an abundant use of her "gingle-bell," "gong," &c., she came upon the barge, cutting her down with every paddle, so that the old hull drifted out and sank. The steamer had a bright light upon her, and her officers and hands were on deck, attending, apparently, by their presence at least and general observation, to their duty.

The owners of the barge now libelled the Granite State in the District Court for New York. The usual conflict existed among the witnesses of the two boats; some swearing that the steamer's own light would have revealed the barge, if good observation had been kept; some that the steamer should have reversed her engine instead of pushing "strong forward" as she did; some that she should have ported, and others that she should have starboarded her helm, &c.

The District Court, in view of the fact that the barge had a right to be where she was and was not bound to have a watch or light, decreed for the libellant and referred it to a commissioner to assess damages. The commissioner fixed the value of the barge at $850, assuming apparently that she was *worth this sum to her owners;* though he stated that having been built for a special and unusual purpose, and being unlike every other sort of craft used in the port of New York he had difficulty in forming any estimate. The difficulty, in truth, was obvious: some witnesses swearing that the boat was not worth having for a gift; others that she was worth eight or ten dollars; and others that in her former condition she could be made practically very useful. There was conflict in the testimony here as in the other part of the case. This report was set aside, and a new estimate directed. On new evidence the commissioner gave $150 more. This report, too, was set aside, and a third reference ordered; the court directing the commissioner to consider

the actual cost of raising and repairing the barge and so putting her as near as could be into her former state. A report made on this basis was confirmed. The case was then taken to the Circuit Court.

The Circuit Court—taking into view the position of the barge at the end of the dock, undistinguishable, in a dark and rainy night, from the end of the dock itself, and with neither watch nor light on it to give notice of its position—thought that it was no fault of the Granite State that she did not discover the barge earlier than she did, and when it was too late to avoid the collision. That court did not consider that the barge was in fault, so as to subject her to a portion of the damages if the Granite State had been found also in fault; but thought that, so far as a watch or a light might have facilitated the discovery of her by the approaching vessel, the omission to have one was a matter properly entering into and influencing the judgment of the court upon the question of negligence on the part of the steamer, and that to this extent the barge was obliged to assume the responsibility of the omission.

It decreed accordingly, reversing the District Court.

The case was now here for review, and was argued *by Mr. Benedict, for the owners of the barge, and by Mr. Owen, contra, for those of the steamer.*

Mr. Justice GRIER delivered the opinion of the court.

It is not controverted, that the barge, which was fastened to the end of the pier, was in a place she was entitled to occupy; that she was not required to have a light suspended during the night time, as vessels anchored in the channel are required; nor to have a watch kept on board to warn off steamboats using the channel of the river. She was not on any track the steamer was required to take; and, being incapable of motion, cannot be justly charged with any participation or fault in causing the collision.

As in the case of *The Louisiana*, recently decided,* there

* *Supra*, p. 164.

was no unusual convulsion of the elements or sudden hurricane which nautical men could not anticipate; no *vis major*, causing a collision which a proper display of nautical skill might not have prevented.

Under such circumstances we are not called upon to inquire wherein the steamboat was not managed with proper nautical skill; whether the bright light which the steamboat had, or ought to have had, was not sufficient to warn her in time of her proximity to the pier if careful watch had been kept; whether she should not have backed her engine instead of rushing forward; whether she should have ported or starboarded her helm. All these inquiries are superfluous where the collision was caused by a vessel having the power to move or stop at pleasure in a channel of sufficient breadth, without any superior force compelling her to the place of collision. The fact that in these circumstances the steamboat did collide with the barge is conclusive evidence that she was not properly managed, and that she should be condemned to pay the damages caused by the collision.

There seems to have been some controversy in the District Court as to the measure of damages. No less than three different reports were made by the master on the subject. The parties have no right to complain of the instructions or opinions delivered by the court. There cannot be an established market value for barges, boats, and other articles of that description, as in cases of grain, cotton, or stock. The value of such a boat depends upon the accidents of its form, age, and materials; and as these differ in each individual there could be no established market value. A person may make considerable profits by the use of an old hulk of little value in the market for vessels. His loss cannot be measured by the ratio of her profits, as he might supply himself with another at a much cheaper rate. But when the injured vessel is not a total loss, and is capable of being repaired and restored to her original situation, the cost necessary to such repair cannot be said to be an incorrect rule of damages.

We do not feel called upon to decide between the opinions of witnesses who have given their guesses on the subject of

the value of this rotten hull; and we see no reason to doubt the correctness of the decision of the district judge on the subject.

The judgment of the Circuit Court must be therefore reversed, and the judgment of the District Court affirmed with costs.

DECREE ACCORDINGLY.

THE SUFFOLK COMPANY v. HAYDEN.

1. Where a party having made application for a patent for certain improvements, afterwards, *with his claim still on file*, makes application for another but distinct improvement in the same branch of art, in which second application he describes the former improvement, but does not in such second application claim it as original, the description in such second application and non-claim of it there, is not a dedication of the first invention to the public.
2. In cases where there is no established patent or license fee, general evidence may be resorted to in order to get at the measure of damages; and evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate.
3. The jury, in ascertaining the damages, upon this sort of evidence, is not to estimate them for the whole term of the patent, but only for the period of the infringement. And a recovery does not vest the infringer with the right to continue the use.
4. Where the patent-office grants a patent for one invention, and afterwards, upon a claim filed previously to that on which such patent has been granted, issues another, the second patent, not the first, is void.

IN December, 1854, Hayden, being the inventor of improvements in cotton cleaners, made application to the commissioner for a patent therefor.

The improvements consisted in certain described changes made by Hayden in the *interior* arrangements of an elongated trunk previously in use for cleaning cotton.

While this application *was still pending*, Hayden made another distinct improvement, not in the interior arrangements of the elongated trunk, but in the *form* of the trunk. This

improvement consisted in increasing, towards the rear end of the trunk, that part of its area above the screen (which divided it horizontally into two distinct parts), so that as the air moved through the trunk towards its rear, the space for its passage being enlarged, the air would gradually move more slowly.

Hayden desired, apparently, to claim this new improvement in the form of the trunk, both separately, *and in combination with his other improvements in the interior arrangements of the trunk*, as to which his application was then pending. Accordingly, in November, 1855, he filed his application for a patent, and on the 17th day of March, 1857, letters were issued to him, in the specification whereof he claims the improvement in *the form of the trunk*, both separately, and in combination with his improvements in the interior arrangements of the trunk; but he *made no claim in this specification to his improvements in the interior arrangements of the trunk.*

It did not appear that Hayden was guilty of any laches, or was in any default in reference to the delay of the commissioner to act on his first application for a patent for improvements in the interior arrangements of the trunk made in December, 1854. For some cause, however, the commissioner had not acted on that application down till June, 1857; and in that month Hayden made another application for a patent, for what the judge at the trial, at the request of the defendants, ruled to be the same improvements, previously applied for in December, 1854; and upon this second application a patent was granted, bearing date December 1, 1857.

[It may be here mentioned incidentally, since the matter was made a point by counsel and is referred to by the court —though the patent of December 1, 1857, was the only one in suit—that the commissioner finally acted on the original application of December 1854, and on the 11th of September, 1860, granted on *it* a patent—and as was *alleged*, though not proved, for the *same improvement* covered by the patent of December 1, 1857.]

Hayden having sued the Suffolk Manufacturing Com-

pany, in the Massachusetts District, for infringement of this last-mentioned patent, the defendants' counsel at the trial, requested the judge to rule that the patent was void, because the improvements in the interior arrangements of the trunk, which were described and claimed in it, being also described and *not* claimed in the patent of the 17th of March, were *by the legal operation of the last-mentioned patent surrendered to the public use.*

The judge refused so to rule, and on error this refusal raised here the first question; the counsel for the Suffolk Company taking the same position here as below.

A second question was on the law as delivered to the jury on the matter of damages.

It appeared that no sales had been made of the patent-right by the plaintiff, or of licenses for the use of it, so as to establish a patent or license-fee as a criterion by which to ascertain the measure of damages. The court below accordingly permitted evidence, after objection, as to the uses and advantages of this improvement over the previous methods of cleaning cotton. And an expert testified that the results were—a more thorough cleaning of the cotton, the saving of all the good fibres, less damage to the staple, the freeing of the room from dust, and the machinery from dust, dirt, and sand; the keeping of the machinery in better order at less cost, and dispensing with one grinder of the cards in consequence of the diminution of dirt and sand, expelling fine dust and dirt not before got out, less breakage of the yarns, &c.

There was, also, evidence of the amount of cotton that had been cleaned at the defendants' mills by the plaintiff's improvement within the period for which the damages were claimed.

The court below, in its charge to the jury, stated the rule as prescribed by the statute, which is the actual damages that the plaintiff has sustained from the infringement; and, while speaking of the patent of December, 1857, among other things, observed:

"Then you will look at the value of the thing used, and ascer-

tain that value by all the evidence as to its character, operation, and effect. You will take into view the value of that which the defendants have used belonging to the plaintiff, to aid you in forming a judgment of the actual damage the plaintiff has sustained."

The jury having found for the plaintiff and damages $1774, the charge as above given was assigned by the defendant for error; and made a second question in this court; the counsel for the defendants arguing that the court in the instructions quoted gave a latitude to the jury in the estimate of damages beyond that of the use or value of the improvements comprised in the patent in question; that they might take into view the improvements on the patent of the 17th March, 1857; and arguing also that the value of the improvement was not a proper matter for the jury to consider when making their estimate of damages.

Messrs. Caleb Cushing and Causten Browne, for the Suffolk Company, plaintiff in error.

Mr. Justice NELSON delivered the opinion of the court.*

The first point of the plaintiff in error is, that the description, in the patent of March, of the improvement patented the December following, and on which the present suit is brought, and omission to claim it on such earlier patent, operated as an abandonment or dedication of it to the public, and that for this reason the subsequent patent of 1st December was void. But the answer to this ground of defence is, that it appeared that Hayden, the patentee had pending before the commissioner of patents an application for this same improvement at the time he described it in the specification of the 17th March, which was, doubtless, the reason for not claiming it in this patent. The description in no sense affected this application thus pending before the commissioner; and, while it remained before him, repelled any inference of abandonment or dedication from the omission to again claim it.

* The Chief Justice and Davis, J., not having sat, being out of town.

This original application before the commissioner for a patent, among other things, for an improvement in the screen of the long trunk, not having been acted upon by that officer, a new application was made by Hayden, separately, for this improvement, and which resulted in the patent of 1st December, 1857, on which the present suit is brought.

We do not perceive any objection to this proceeding. It simplified the application, and disembarrassed it from its connection with other improvements claimed; and, doubtless, hastened the granting of the patent. The office, however, subsequently acted upon this original application, and, on the 11th September, 1860, granted a patent to the plaintiff, and, as is alleged, for the same improvement embraced in the patent of the 1st December, 1857, the one in question. And it is insisted that, for this reason, this prior patent for the same improvement is void. This is, obviously, a misapprehension. The last, not the first, is void.

We may add, on looking at the patent of 11th September, 1860, it does not appear that it was granted for the same improvement. It is a patent for a combination of this improvement with other devices.

As to the question of damages. It is supposed by the counsel for the defendants that the court, in the instructions quoted on preceding pages, gave a latitude to the jury in the estimate of damages beyond that of the use or value of the improvements embraced in the patent in question; that they might take into consideration the improvements on the patent of the 17th March, 1857, for widening one end of the trunk. But it is quite apparent that the court was speaking all the time with reference to the improvement in the patent in suit, and the only one in contestation. It is, also, urged that the value of the improvement was not a proper subject for the consideration of the jury in estimating the damages. This may be admitted. But looking at the term *value*, in the connection in which it was used, it is quite clear that it had reference only to the utility and advantages, or value of the use of the improvement over

the old mode of cleaning cotton; not the value of the patent itself.

This question of damages, under the rule given in the statute, is always attended with difficulty and embarrassment both to the court and jury. There being no established patent or license fee in the case, in order to get at a fair measure of damages, or even an approximation to it, general evidence must necessarily be resorted to. And what evidence could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss to the patentee or owner, by the piracy, instead of the purchase of the use of the invention.

It is proper to say, as was said in the court below, that the jury, in ascertaining the damages upon this evidence, is not to estimate them for the whole term of the patent, but only for the period of the infringement. A recovery does not vest the infringer with the right to continue the use, as the consequence of it may be an injunction restraining the defendant from the further use of it.

JUDGMENT AFFIRMED.

CHEANG-KEE v. UNITED STATES.

1. The action of a Circuit Court relative to a motion and order for judgment, is a matter within the Circuit Court's discretion, and not a subject for review here.
2. Under a statute of California, which provides that new matter in an answer shall on the trial be deemed controverted by the adverse party, witnesses may properly be examined, in a case where *such* an answer having new matter is put in.

Statement of the case.

3. In *debt* for custom-house duties, a judgment for so many dollars, "payable in gold (and silver) money of the United States" for duties, is good; [nothing but gold and silver coin having been made a legal tender for this species of debt to the government; though Treasury notes were by a statute of 1862 made a legal tender in regard to most other debts.]
4. If the judgment have been originally entered "payable in gold coin of the United States," &c., it may be amended during the term by the insertion of the words, "and silver," as above indicated.

A STATUTE of the United States,* relating to the Circuit Court for California, enacts that, by consent of parties, "issues of fact in civil cases may be tried and determined by the said Circuit Court without the intervention of a jury."

Under this statute the court, in giving its decision, is to state the facts found and the conclusions of law separately; and a review by this court is to be limited to a determination of the sufficiency of the facts found to support the judgment, and to the rulings of the court in admitting or rejecting evidence, and in the construction of written documents.

With this act in force, the United States sued Sun Cheang-Kee, by claim in the nature of *debt* for duties for goods imported by him into the port of San Francisco, on the 13th of August, 1862; and after the passage of the statute of 25th February, 1862, which enacted, that Treasury notes of the United States should be lawful money, and a tender in payment of all debts, public and private, *except duties on imports, &c.* Kee put in his answer according to the practice customary in the State of California. Its defence was, payment of the duties, as ascertained by the collector of the port under a statute in force prior to the 14th July, 1862, in ignorance on his part, and on the part of the importer, of an enactment which was made of that date imposing higher rates. It *alleged* that the existence of the act of July was unknown in California until after the duties had been assessed and paid, and the goods delivered to the importer and *sold;* and insisted that, under the circumstances, the government was

* Act of February 19, 1864; 13 Stat. at Large, ch. xi, § 7, p. 5.

concluded by the act of the collector in assessing and receiving the duties under the act previously in force.

In this state of things, the parties having consented that the case should be tried and determined by the court, the counsel for the United States moved for judgment on the pleadings and according to the claim, which order the court made. For some reason not stated on the record—but which the reporter supposes was a difference of opinion discovered subsequently to the date of the order, to exist between the counsel of the parties as to whether, if judgment were rendered on the pleadings, the facts set forth in the answer would on error be assumed as true—the same counsel subsequently moved the court to set aside the order; which motion the court granted.

The cause was then tried by the court. Witnesses were examined and counsel heard, and the court found:

1. That the defendant imported the goods as alleged.

2. That the duties on the importation, under the law then in force, amounted to $1432.55.

3. That the defendant paid on account of said duties, $211.70, leaving due $1240.85; and,

4. As a conclusion of law, that the United States were entitled to judgment for the balance due, with interest, amounting to $1388.10, payable in gold coin, for duties, with costs.

These findings excluded the defence set up by the answer upon the facts.

In the course of the trial, exceptions to what had been done were presented thus:

1. That the counsel of the plaintiffs had moved for judgment *on the pleadings*, and that the court had ordered judgment accordingly.

2. That with this order in force the same counsel had afterwards moved the court to vacate and set aside the same; which the court had also done.

3. That on the trial subsequently had, the court had heard evidence upon the issue, notwithstanding (as the reporter understood the point of the objection to be) the previous

judgment on the pleadings. This proceeding the counsel for the defendant objected to as irregular.

The court gave judgment for the United States for the balance already mentioned, of $1388.10, "payable in gold coin," the judgment being amended during the term so as to read payable "in gold *and silver* coin." (The record of the judgment recited the findings, thus showing that the amount for which the judgment was entered was "*for duties.*"*) The exceptions were now brought here; error being also assigned in the rendering of judgment for the United States payable in gold coin of the United States "for duties;" as the counsel put it in their assignment of errors; so arguing it also. Objection was also made to the amendment, which made the judgment read, in gold (and silver) coin, &c.

Mr. Gould, for Kee, the plaintiff in error:

1 and 2. The first two exceptions, although apparently inconsistent with each other, are not really so. The motion of the plaintiff was for judgment on the pleadings. The motion admitted, impliedly and in effect, that the answer was true. This was an important admission for us. When made, we had a right to it. It gave as in effect a "case stated," for this court. We could, indeed, have proved the truth of our answer by witnesses, when the court below, under the statute, would have found the same thing. But it was unjust to set aside the finding at the plaintiff's request, and to require us to summon witnesses anew, and pay the fees for their attendance, to say nothing of time or trouble. We did not see fit to do so; relying rather on our writ of error.

* The record, in exact words, ran thus:

"As a conclusion of law, the court *finds* that plaintiffs are entitled to a judgment against defendant for the said sum of thirteen hundred and eighty-eight $\frac{10}{100}$ dollars, payable in gold and silver coin of the United States, *for duties*, with the costs of this action. And it was thereupon *ordered that judgment be entered in accordance with the said findings.*

"WHEREFORE, by reason of the law and the premises, it is ordered and adjudged that the said plaintiffs do have and recover of and from the said defendant the sum of thirteen hundred and eighty-eight $\frac{10}{100}$ dollars, *in gold [and silver] coin of the United States*, together with his costs of this action, taxed at ——, and that plaintiffs have execution therefor."

3. [On this third exception nothing was said or explained.]

4. This assignment of errors is to the peculiar form of the judgment. We object, also, to the amendment.

The Federal courts have uniformly held that "debt" is the proper action to recover what is due by an importer to the government, after he has received his goods.* The present action is in the form of that action. When the goods are delivered to the importer, duties are converted into debts. We do not pretend that duties are originally merely a debt. They are also a species of tax. In their capacity of tax, they operate *in invitum*, and are a lien upon property; and the property, before delivery to the importer, may be sold by the government, as provided by law, to satisfy the duties; and as government may declare in what coin or species of property taxes shall be paid, so, if they are unpaid, it may at a sale thereof receive nothing in payment but the particular currency or species of property in which taxes may be reserved.

The government is thus armed with two remedies, each distinct from the other:

1st. The right to enforce the lien on the goods by an *ex parte* sale, and at such sale to require payment in the specific coin in which the duty is payable; and

2d. To sue the importer in an action of debt, to recover the pecuniary value of the duty.

The power of the government (provided it has not lost its lien on the goods) is complete to require and compel payment in the specific coin. It has the power, in the language of the Constitution, "to lay and collect duties." But if then there is a mere debt due by the importer to the government for the amount of the duties, such *debt* may be discharged by any lawful money of the United States. The form of the judgment is therefore erroneous; and the fact that it is an unusual form of judgment is itself a great argument against its being a right form. "A universal silence, in Westminster Hall, on a subject which frequently gives occasion for

* Meredith v. United States, 13 Peters, 493.

litigation," is spoken of by Buller, J., in a great case,* as "a strong argument," to prove that a matter now first spoken of does not exist. "By Littleton it appeareth," says Lord Coke, "that the formes of judgments, pleas, and other legal proceedings, doe much conduce to the right understanding of the law." The "formes" of the law are indeed both the indices and conservatories of its principles, and the form of judgments for money, ever since courts of common law began to exist, has been simply for money, without specifying the commodity from which it may chance to be manufactured.

It has moreover been expressly decided that even where a contract is, in terms, payable in gold coin, courts of law have no power to render a judgment payable in such coin, or otherwise than for current money.†

If it was error to make the judgment "payable in gold [and silver] coin of the United States," what shall we say of the statement "for duties?" If there be one principle of law more elementary than another, it is that a judgment is a merger of the plaintiff's demand. If the judgment is for so much current money, then the effect of these words, so far as they have any, is practically to prevent a merger of the plaintiff's demand, and to keep alive its original cause of action. It has not hitherto been the custom of courts, in their judgments, to inform the public what the extent of the original cause of action was. What would be thought of a judgment in these words: "That the plaintiff recover from the defendant the sum of one thousand dollars *for a note*, payable in gold coin?" We have a right to a judgment absolute on its face. The court must tell us categorically what we must do, and not leave our liabilities to the construction of the marshal.

Mr. Speed, A. G., and Mr. Lake, D. A. for California, contra.

* Le Caux v. Eden, Douglas, 594.

† Wood v. Bullens, 6 Allen, 516; Schoenberger v. Watts, 1 American Law Register, N. S., 568.

The CHIEF JUSTICE delivered the opinion of the court.

The first two exceptions—those relating to the motion and order for judgment, and to the motion and order to set aside what had been directed—relate to matters wholly within the discretion of the Circuit Court, and are not reviewable here. This is not merely settled by repeated decisions, but is expressly directed by an act of Congress prescribing the limits of this court's jurisdiction upon writs of error to the Circuit Court of California.*

The third exception related to the examination of witnesses on the trial. This exception must rest on the assumption that inasmuch as the pleadings consisted only of claim and answer, the answer must be taken as true, and could not be contradicted by witnesses.

But the statute of the State, which has been adopted as a rule by the Circuit Court of the United States for the District of California, expressly declares that new matter in an answer shall, on trial, be deemed controverted by the adverse party.† Under that statute the answer of the defendant below could not be taken as true. Witnesses, therefore, were properly examined.

The only other exception is to the form of the judgment, which was originally for the amount due, payable in gold coin, for duties; and afterwards, during the term, amended by order of the court so as to make it "payable in gold *and silver* coin, for duties." The objection is to the amendment and to the statement in the judgment that it is "payable in gold and silver coin, for duties." The amendment, made during the term, was clearly within the power of the court. The statement merely declared the legal effect of the judgment. The whole case shows that the judgment was for duties on imports, and nothing but gold and silver coin has been made a legal tender for this description of indebtedness to the government. This statement, therefore, is strictly correct, and though unnecessary, could not affect the validity of the judgment.

AFFIRMED WITH COSTS.

* Act of February 19, 1864, § 7. † 2 General Laws of California, § 5005.

THOMSON v. LEE COUNTY.

The general doctrines of this court, as settled by various recent decisions, on the subject of railroad bonds issued by municipal corporations to "bearer," and which have passed into the hands of *bonâ fide* holders for value,—affirmed and acted on; in the following points decided:

1. A county, or other municipal corporation, has no inherent right of legislation, and cannot subscribe for stock in a public improvement, unless authorized to do so by the legislature. But the legislature of a State, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner that the objects can be attained either with or without the sanction of the popular vote.
2. If the courts of a State have when an agreement is made construed their constitution and laws so as to give the agreement force and vitality, the same courts cannot, by a subsequent and contrary construction, render it invalid.
3. If the legislature possess the power to authorize an act to be done, it can by a retrospective act cure the evils which existed, because the power thus conferred has been *irregularly* executed.
4. Bonds with coupons, payable to bearer, are negotiable securities, and pass by delivery; and, in fact, have all the qualities and incidents of commercial paper.
5. If coupons to bonds are drawn so that they can be separated from the bonds, and like the bonds, are negotiable; the owner of them can sue on the coupons without producing the bonds to which they were attached, or without being interested in them.

THE constitution of Iowa, made in 1846, and which invested the General Assembly with all the legislative power of the State, ordained thus:

"The General Assembly shall not in *any manner* create any debt or debts, liability or liabilities, which shall singly or in the aggregate, with any previous debts or liabilities, exceed the sum of *one hundred thousand dollars*, except in the case of war, &c., unless the same shall be authorized by some law for some single object or work to be distinctly specified therein, &c. No such law shall take effect until at a general election it shall have been submitted to the people and have a majority of all the votes cast for and against it at such election."

With this constitution in force and after certain statutes had been passed by the General Assembly relative to the corporate powers of counties, their right to execute bonds for railroads, &c., it was decided, or so said to be, at an election held in Lee County, Iowa, in 1856, to take stock and issue bonds to three different railroads; one hundred and *fifty* thousand dollars to *each*.

The validity of the subscription was contested in the proper court, soon afterwards, as having been the exercise of a power not given to the county, or as so irregular an exercise of it, if given, as to be void. The court, in December, 1856, decided that the election was irregular, and conferred no power to issue the bonds. The legislature of the State, on the 29th of July, 1857, accordingly passed an act entitled "An act *legalizing* the issue of county, city, and town corporation bonds in the counties of *Lee* and Davis." This act declared "that all votes heretofore taken in the counties of Lee and Davis in the form of a joint or several proposition whether said counties will aid in the construction of one or more railroads, specifying the amount to be given to each . . . and the bonds of said counties issued in pursuance of said votes and subscriptions shall be a valid lien upon the taxable property of said county." After this the county judge, the proper officer, if the act was valid, proceeded to take the stock and issue bonds. The bonds were in the ordinary form of what are called coupon bonds; payable to "bearer." The coupons attached were in a like negotiable shape; "promises to pay to the bearer at the Continental Bank, in the city of New York, forty dollars interest on bond No. 1."

Soon after the bonds were issued the county laid a tax to meet the interest due on the coupons. The legality of the tax was denied by some tax-payers of the county, but the court of last resort in the State having declared it lawful,* the money was collected and the coupons paid for a short time. The court, however, subsequently reviewed and re-

* McMillen v. The County Judge, 6 Iowa, 391.

versed its former decision; and the tax being no longer levied the coupons were no longer paid. A number of them being now in the hands of Mr. Edgar Thomson, of Philadelphia, *cut off from the bonds to which they had been originally attached*, he brought suit in the Federal courts of Iowa to recover them; not producing, however, the bonds to which they had originally belonged.

The court charged:

1st. That the bonds or coupons sued on, were issued without authority of law, and were void.

2d. That the "Curative Act," of January, 1857, gave no validity to the bonds.

3d. That the plaintiff could not recover on the coupons unless he showed that he also owned at the time the several bonds from which they were cut.

4th. And *refused* to charge that if all branches of the State government of Iowa had held such railroad bonds to be valid at the time they were issued, no question could afterwards be made as to their validity.

The county having had judgment, the matter was now on error here, where the same kind of questions that have been so abundantly discussed in this court, of late, in *Gelpcke* v. *City of Dubuque*;* *Meyer* v. *Muscatine*;† *Mercer County* v. *Hackett*;‡ *Seybert* v. *City of Pittsburgh*;§ *Van Hostrup* v. *Madison City*;‖ *Murray* v. *Lardner*;¶ *Sheboygan Co.* v. *Parker*;** *Havemeyer* v. *Iowa Co.*,†† were raised and discussed by briefs anew; *Mr. Allison, for Lee County*, who sought to distinguish this case from any of those, contending that the constitution of Iowa restricted the legislature from authorizing the bonds; that this was now the construction given to the constitution by the Supreme Court of Iowa; that the vote and proceedings by which the bonds were authorized were irregular; that the "Curative Act" of 1857 was inoperative, and that if this were all otherwise yet that Thomson, who appeared to

* 1 Wallace, 175. † Id. 384. ‡ Id. 88.
§ Id. 272. ‖ Id. 291. ¶ 2 Id. 110.
** 3 Id. *supra* 98. †† Id. *supra*, 294.

own nothing but the coupons, could not recover on them, without producing the bonds themselves.

Messrs. Howell and Grant, contra.

Mr. Justice DAVIS delivered the opinion of the court.*

There is hardly any question, connected with the species of securities on which this suit was brought, that has not been discussed and decided by this court; and it is unnecessary to do more in this opinion than reaffirm the general doctrines of the court on the subject, so far as they apply to the case in hand, without attempting to restate the reasons which were given for our decisions.

A county, or other municipal corporation, has no inherent right of legislation, and cannot subscribe for stock in a public improvement, unless authorized to do so by the legislature. Such a corporation acts wholly under a delegated authority, and can exercise no power which is not in express terms, or by fair implication, conferred upon it. But the legislature of a State, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner, that the objects can be attained, either with or without the sanction of the popular vote.

It is insisted that the constitution of Iowa did lay a restraint on the legislature, and that consequently the county of Lee could have no right, under the constitution and laws of the State, to execute and issue the bonds in controversy. And we understand that the highest court of the State of Iowa, at the present time, adopt that view of the question; but when these bonds were issued, the courts of that State held that there was no defect of constitutional power, and that the legislature could lawfully authorize municipal corporations to subscribe to the capital stock of railroad com-

* Nelson, J., not having sat—having been indisposed—and Miller, J., not taking part in the decision.

panies. If the bonds in suit had been executed since the last decision in Iowa, they would be controlled by it; but the change in judicial decision cannot be allowed to render invalid contracts which, when made, were held to be lawful. The courts of Iowa having, when these bonds were issued, construed their constitution and laws so as to give them force and vitality, cannot, by a subsequent and contrary construction, destroy them.

But it is argued that when the county of Lee voted to take the stock for which these bonds were given, they attempted the exercise of a power which had not been delegated to them, or executed it so defectively, that their proceedings were without authority of law, and void.

It is not instructive to inquire into the different laws of Iowa under which this power is claimed to exist, because the legislature of that State, on the 28th day of January, 1857, by an act of confirmation, legalized the issue of these bonds. If the legislature could authorize this ratification, the bonds are valid, notwithstanding the submission of the question to the vote of the people, or the manner of taking the vote may have been informal and irregular. This act of confirmation, very soon after its passage, underwent an examination in the courts of Iowa, and it was held that the legislature possessed the power to pass it, and that the bonds were valid and binding on the county.* It is difficult to see how *this* power could be questioned, after the Supreme Court of the State had decided that there was no written limitation which inhibited the legislature from conferring on cities and counties, the right to take stock in a company organized to build a railroad, or other work of public improvement. If the legislature possessed the power to authorize the act to be done, it could, by a retrospective act, cure the evils which existed, because the power thus conferred had been irregularly executed. The question with the legislature was one of policy, and the determination made by it was conclusive.

Bonds with coupons, payable to bearer, are negotiable

* McMillen v. The County Judge, 6 Iowa, 391.

securities, and pass by delivery, and, in fact, have all the qualities and incidents of commercial paper.

It is not necessary that the holder of coupons, in order to recover on them, should own the bonds from which they are detached. The coupons are drawn so that they can be separated from the bonds, and like the bonds, are negotiable; and the owner of them can sue without the production of the bonds to which they were attached, or without being interested in them.

The foregoing views dispose of all the questions presented in this record, and it is unnecessary to refer in detail to the charge of the Circuit Court.

JUDGMENT REVERSED, with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

MINNESOTA COMPANY *v.* NATIONAL COMPANY.

The court—deciding that the present case is the same in fact as one already twice before it and already twice decided in the same way—rebukes, with some asperity, the practice of counsel who attempt to make the judges bear the "infliction of repeated arguments" challenging the justice of their well-considered and solemn decrees; and sends the case represented by them out of court with affirmance and costs.

THIS case came here by writ of error to the *Supreme Court of the State of Michigan*, and under the name of *The Minnesota Mining Company*, plaintiff in error, *versus The National Mining Company and J. M. Cooper*, defendants in error, the action below being for the recovery of *real property*. Though nominally different the parties were in fact the same parties who litigated the case of *Cooper* v. *Roberts*, adjudged by this court at December Term, 1855.* The same title was again, as the court declared, brought in issue, and the same ques-

* 18 Howard, 173.

tion again agitated.* When the question was heard at December Term, 1855, it was elaborately discussed by counsel and deliberately considered by the court, and a unanimous decision given in favor of the party claiming, as the present defendant in error now in fact claimed. Nevertheless, the losing party, unwilling to acquiesce in a single decision, brought the case again before the court by a second writ of error. This second writ was heard at December Term, 1857.† The counsel on that occasion labored with great zeal and ability to convince the court that its first decision was erroneous, but were unsuccessful.

In both the cases last referred to, the controversy came before this court on writs of error *in ejectment* to the *Circuit Court of the United States* for the District of Michigan.

Veiled under the new forms stated at the beginning of the case, to wit, the forms of a writ of error to the highest *State court of Michigan*, and with the names of mining companies for parties, and with some other unimportant variations, the matter was now brought for a third time before this tribunal; no counsel presenting himself to argue the case for the plaintiff in error, and the argument on that side being by brief of non-appearing counsel only.

Mr. Buel, for the defendants in error, after protesting against what he declared to be an abuse of the suitor's privilege and of this court's well-known longanimity, was beginning to argue the case on merits, when certain of the older associates who recognized the case as an old one, interposing, he was stopped by the Chief Justice, with an intimation that the court, as at present advised, thought argument on them unnecessary; and that he might consider himself as relieved.

* In this case, as in that, the court considered that "the question submitted to the court was whether a lease made by the Secretary of War of mineral lands, including section sixteen (appropriated by law to the State of Michigan, and commonly called the School Section), conferred a right upon the mining company to enter their land and obtain a patent for the whole or any part of that section."

† 20 Howard, 480.

The court having examined the case, Mr. Justice GRIER now delivered its opinion, and after stating the identity of the present case with the former, what was decided in the former and involved in this, and the history as above given, expressed himself in behalf of the Bench as follows:

This is another, and it is to be hoped the *last* attempt to persuade this court to reverse their decision in this case.

Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments.

The decision of the Supreme Court of Michigan, in conformity with the opinion of this court twice pronounced on the same title, is hereupon

AFFIRMED WITH COSTS.

BUCK v. COLBATH.

1. A suit prosecuted in the State courts to the highest court of such State, against a marshal of the United States for trespass, who defends himself on the ground that the acts complained of were performed by him under a writ of attachment from the proper Federal court, presents a case for a writ of error under the 25th section of the Judiciary Act,

Statement of the case.

when the final decision of the State courts is *against* the validity of the authority thus set up by the marshal.

2 The case of *Freeman* v. *Howe* (24 Howard, 450)—an action of replevin—decided that property held by the marshal under a writ from the Federal court, could not be lawfully taken from his possession by any process issuing from a State court; and decided nothing more.

3 The ground of that decision was that the possession of the marshal was the possession of the court, and that pending the litigation, no other court of merely concurrent jurisdiction, could be permitted to disturb that possession.

4. An action of trespass, for taking goods, does not come within the principle of that case, inasmuch as it does not seek to interfere with the possession of the property attached; but it involves the question, not raised in that case, of the extent to which the Federal courts will protect their officers in the execution of their processes.

5. With reference to this question, all writs and processes of the courts, may be divided into two classes:

i. Those which point out specifically the property or thing to be seized.

ii. Those which command the officer to make or levy certain sums of money, out of property of a party named.

6. In the first class the officer has no discretion but must do precisely what he is commanded. Therefore, if the court had jurisdiction to issue the writ, it is a protection to the officer in all courts.

7 But in the second class the officer must determine for himself whether the property which he proposes to seize under the process, is legally liable to be so taken, and the court can afford him no protection against the consequences of an erroneous exercise of his judgment in that determination. He is liable to suit for injuries growing out of such mistakes in any court of competent jurisdiction.

8. A plea, therefore, which does not deny that the property seized was the property of the plaintiff, or aver that it was liable to the writ under which it was seized, is bad in any court.

9 The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations; and is confined to suits between the same parties, or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought; and does not extend to all matters which may by possibility become involved in it.

COLBATH sued Buck in one of the State courts of Minnesota, in an action of *trespass* for taking goods. Buck pleaded in defence, that he was *marshal of the United States* for the District of Minnesota, and that having in his hands a writ of attachment against certain parties whom he named, he levied

the same upon the goods, for taking which he was now sued by Colbath. *But he did not aver that they were the goods of the defendants in the writ of attachment.*

On the trial Colbath made proof of his ownership of the goods, and Buck relied *solely on the fact that he was marshal* and held the goods under the writ in the attachment suit.

The court refused to instruct the jury that the defence thus set up was a sufficient one; and the plaintiff had a verdict and judgment. This judgment was affirmed on error in the Supreme Court of Minnesota, and the defendant brought the case here under the 25th section of the Judiciary Act; an act which, as most readers will remember, provides that a final judgment in any suit in the highest court of a State where is drawn in question "the *validity of an authority exercised under the United States*, and the decision is *against* its validity," may be reviewed in this court.

Mr. Peckham, for the marshal, plaintiff in error, contended that the question whether the fact of his office, set up by the marshal, was or was not a sufficient defence to the suit brought against him, had been settled in the affirmative by the case of *Freeman* v. *Howe* in this court.* In that case White sued a railway company in the Federal court and the marshal attached a number of rail-cars: seizing and taking them into his own possession. While thus in his custody, the sheriff, under process from one of the State courts, sought to take them out of his possession *under a writ of replevin*. The marshal, in the replevin suit, set up by way of defence the authority under the Federal court by which he held the property; in other words, that he held it *as* marshal of the United States. And this court held that a sufficient defence.

If the present action were replevin instead of trespass it cannot be doubted that the plaintiff below would fail. The fact that the suit is one of trespass makes no difference. The thing has nothing to do with forms of action. The court, we may almost say, so declared in *Freeman* v. *Howe*.

* 24 Howard, 450.

Quoting a former case in this court,* and declaring specifically that they "*agree*" to it, they say:

"It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction it has a right to settle every *question* which occurs *in the case* . . . and that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be *arrested* or taken away by proceedings in another court."

Now, this question whether the property which the marshal seized, was or was not liable to the attachment, does occur "in the case." It springs immediately out of it. A suit against him in a State court for a trespass in taking the property does, moreover, in effect "arrest"—for it obstructs and hinders—the proceedings in the Federal court. It subjects the marshal and those under whose directions he acts to the annoyance of a multiplicity of actions in various jurisdictions for things springing out of the same "question."

Independently of which, trespass and replevin are universally concurrent remedies for taking goods as these have been taken. To hold that this action was properly brought and not overrule *Freeman* v. *Howe*, would be to hold that the marshal had the right to take these goods and was yet liable for a trespass; was bound to hold them, and yet should suffer for the detention.

The principles, we suppose, upon which *Freeman* v. *Howe* went were these:

1. That where the officers of a court, State or national, have taken possession of a *res*, under process of attachment or execution, as the property of the defendant in such process, such *res* is in the custody of the law, and the possession of such officers or court is exclusive.

2. That the question, whether such *res*, so seized as the property of the defendant in the process, is rightfully seized by the marshal as the property of the defendant in the process, or otherwise subject to the exigency of the writ, is one

* Peck v. Jenniss, 7 Howard, 624.

of jurisdiction, the authority to decide which belongs exclusively to the court issuing the process; or, in the language of this court, the "*question* is one of right and title to the property under the Federal process, and which belongs to the Federal, not the State courts to determine."

There was nothing new in these principles. *Hogan* v *Lucas*,* and *Taylor* v. *Caryl*,† asserted the first; and other cases‡ assert in effect the second.

The last principle was thus stated by Marshall, C. J., in *Slocum* v. *Mayberry*:

"If the officer has a right under the United States to seize for a supposed forfeiture, the *question*, whether that forfeiture has been actually incurred, belongs exclusively to the Federal courts, *and cannot be drawn to another forum*."

It was argued, in *Day* v. *Gallup*,§ that a State court would have jurisdiction to try the question *after* the case in the Federal court was concluded, and thus no longer pending, and the question had not therein been raised or decided. But the argument is not sound. If a court has "exclusive" jurisdiction to decide "every question which occurs in the case," other courts cannot be trying these questions either at the same time or at any other.

Neither is there any hardship or inconvenience in the law as we assert it. The fact—if it *be* a fact, as is probable—may be objected, that the marshal and Colbath, the two parties to this suit, are citizens of the same State; that the question, whether these goods belonged to Colbath or not, and whether Buck, the marshal, was or was not a trespasser, was not in issue in the attachment suit, out of which the suit below sprung; and that, being citizens of the same State, Colbath could not sue the marshal in the Federal court, nor ever have the question of trespass decided in that jurisdiction to which we say that the question exclusively belongs.

* 10 Peters, 400. † 20 Howard, 583.

‡ Slocum v. Mayberry, 2 Wheaton, 1; and Peck v. Jenniss, 7 Howard 624.

§ 2 Wallace, 118

The same sort of objection was made in *Freeman* v. *Howe*. It was there argued by counsel for the defendant in error that the plaintiffs in the replevin suit were remediless in the Federal courts, both parties being citizens of the same State. But the court says "that this is a misapprehension, and that a bill in equity may be filed to restrain or regulate the suit at law, and to prevent injustice or an inequitable advantage; such bill being supplementary to the original suit, and maintainable without reference to the citizenship of the parties." It says, moreover, "In a proceeding *in rem*, any person claiming an interest in the property paramount to that of the libellant, may intervene by way of defence for the protection of his interest;" and adds, that "the same is equally true of a proceeding by attachment."

Colbath had, therefore, a complete means of righting himself in the Federal court; which was first seized of the case; which knew its history from the beginning; and which, from the extent of its knowledge in the matter, and from having all parties before it, was best able to do full and complete justice to all concerned.

Mr. Carlisle, contra, for Colbath, defendant in error, replied ably to these positions. The full and very luminous manner in which the whole subject is handled by the court, deciding in favor of the cause maintained by Mr. Carlisle, dispenses, however, with the necessity of presenting this gentleman's arguments, or of remarking more than that along with them he suggested, not pressing it strongly, a point of jurisdiction. On that point he observed that the pleadings presented a single issue: whether the goods taken were the goods which the marshal was authorized to take under the process which he held? The pleadings did not admit that the Federal process in the hands of the marshal authorized or purported to authorize him to take the goods of Colbath. Nor did they question or deny his authority to take the goods of the *defendants* named in the writ. On the contrary, they plainly admitted this authority, and limited the plaintiff's ground of action to the abuse of that authority,

and to the misapplication of it to subjects not purporting to be comprehended or affected by it. It was nothing to the purpose, Mr. Carlisle observed, that the marshal did the act complained of by *color* of his office and of process in his hands, if that process did not purport to authorize the act.

Here, then, was not drawn in question "the *validity* of an authority exercised under the United States." The Federal process was admitted to be valid in the case in which it was issued. It was, therefore, not a case within the provisions of the 25th section of the Judiciary Act.

Day v. *Gallup*, which closely resembled this case (being an action of trespass under like circumstances), was dismissed for want of jurisdiction; although the taking complained of plainly appeared to have been upon process of execution, issued out of the Federal court, it being held that no case under the 25th section necessarily presented itself upon the record.

Mr. Justice MILLER delivered the opinion of the court.

There seems to be no reason to doubt that the case comes within the provisions of the 25th section of the Judiciary Act. The defendant claimed the protection of "an authority exercised under the United States," and the decision was against the protection thus claimed; or, in other words, against the validity of that authority, as a protection to him in that action. Whether the authority which he thus set up was valid to protect him, is a question for this court to decide finally, and is properly before us under the writ of error to the Supreme Court of Minnesota.

Upon the merits of the case, the plaintiff in error relies mainly on the case of *Freeman* v. *Howe*, decided by this court, and upon the opinion by which the court sustained the decision.

That was a case like this in every particular, with the single exception, that when the marshal had levied the writ of attachment on certain property, a writ of replevin was instituted against him in the State court, and the property

taken out of his possession; while in the present case the officer is sued in trespass for the wrongful seizure.

In that case it was held, that although the writ of attachment had been wrongfully levied upon the property of a party not named in the writ, the rightful owner could not obtain possession of it by resort to the courts of another jurisdiction.

It must be confessed that this decision took the profession generally by surprise, overruling, as it did, the unanimous opinion of the Supreme Court of Massachusetts—a court whose opinions are always entitled to great consideration—as well as the opinion of Chancellor Kent, as expressed in his Commentaries.*

We are, however, entirely satisfied with it, and with the principle upon which it is founded; a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is, that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. This is the principle upon which the decision of this court rested in *Taylor* v. *Caryl*,† and *Hogan* v. *Lucas*,‡ both of which assert substantially the same doctrine.

A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit.

* Vol. i, 410. † 20 Howard, 583. ‡ 10 Peters, 400.

This principle, however, has its limitations; or rather its just definition is to be attended to. It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions.

It is upon this ground that the court, in *Day* v. *Gallup*, held that this court had no jurisdiction of that case. The property attached had been sold, and the attachment suit ended, when the attaching officer and his assistants were sued, and we held that such a suit in the State court, commenced after the proceedings in the Federal court had been concluded, raised no question for the jurisdiction of this court.

It is obvious that the action of trespass against the marshal in the case before us, does not interfere with the principle thus laid down and limited. The Federal court could proceed to render its judgment in the attachment suit, could sell and deliver the property attached, and have its execution satisfied, without any disturbance of its proceedings, or any contempt of its process. While at the same time, the State court could proceed to determine the questions before it involved in the suit against the marshal, without interfering with the possession of the property in dispute.

How far the courts are bound to interfere for the protection of their own officers, is a question not discussed in the case of *Freeman* v. *Howe*, but which demands a passing notice here. In its consideration, however, we are reminded at the outset, that property may be seized by an officer of the court under a variety of writs, orders, or processes of the court

For our present purpose, these may be divided into two classes:

1. Those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of replevin at common law, orders of sequestration in chancery, and nearly all the processes of the admiralty courts, by which the *res* is brought before it for its action.

2. Those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand gainst him, without describing any specific property to be thus taken. Of this class are the writ of attachment, or other mesne process, by which property is seized before judgment to answer to such judgment when rendered, and the final process of execution, elegit, or other writ, by which an ordinary judgment is carried into effect.

It is obvious, on a moment's consideration, that the claim of the officer executing these writs, to the protection of the courts from which they issue, stands upon very different grounds in the two classes of process just described. In the first class he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described. It follows from this, as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts.

And in addition to this, in many cases the court which issued the process will interfere directly to protect its officers from being harassed or interfered with by any person, whether a party to the litigation or not. Such is the habitual course of the court of chancery, operating by injunction against persons who interfere by means of other courts.

And instances are not wanting, where other courts have in a summary manner protected their officers in the execution of their mandates.

It is creditable, however, to the respect which is paid to the process of courts of competent jurisdiction in this country, that the occasion for the exercise of such a power is very rare.

In the other class of writs to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion. *First*, in ascertaining that the property on which he proposes to levy, is the property of the person against whom the writ is directed; *secondly*, that it is property which, by law, is subject to be taken under the writ; and *thirdly*, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else.

In the case before us, the writ under which the defendant justified his act and now claims our protection, belongs to this latter class. Yet the plea on which he relied contains no denial that the property seized was the property of plaintiff, nor any averment that it was the property of either of the defendants in the attachment suit, or that it was in any other manner subject to be taken under that writ.

Seizing upon some remarks in the opinion of the court in the case of *Freeman* v. *Howe*, not necessary to the decision of that case, to the effect that the court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause, and that the Federal court could not permit the State court to withdraw from the former the

decision of such issues, the counsel for plaintiff in error insists that the present case comes within the principle of those remarks.

It is scarcely necessary to observe that the rule thus announced is one which has often been held by this and other courts, and which is essential to the correct administration of justice in all countries where there is more than one court having jurisdiction of the same matters. At the same time, it is to be remarked that it is confined in its operation to the parties before the court, or who may, if they wish to do so, come before the court and have a hearing on the issue so to be decided. This limitation was manifestly in the mind of the court in the case referred to, for the learned judge who delivered the opinion, goes on to show, that persons interested in the possession of the property in the custody of the court, may, by petition, make themselves so far parties to the proceedings as to have their interests protected, although the persons representing adverse interests in such case do not possess the qualification of citizenship necessary to enable them to sue each other in the Federal courts. The proceeding here alluded to is one unusual in any court, and is only to be resorted to in the Federal courts, in extraordinary cases, where it is essential to prevent injustice, by an abuse of the process of the court, which cannot otherwise be remedied. But it is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly.

In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an

action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is, that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its own mode, to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment of each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts.

The limitation of the rule must be much stronger, and must be applicable under many more varying circumstances, when persons not parties to the first proceeding are prosecuting their own separate interests in other courts.

The case before us is an apt illustration of these remarks. The proceeding in the attachment suit did not involve the question of the title of Colbath, defendant in error, to the property attached. The whole proceeding in that court, ending as it might in a judgment for the plaintiff, an execution and sale of the property attached, and satisfaction thereby of the plaintiff's debt, may be, and in such cases usually is, carried through without once requiring the court to consider the question of title to the property. That is all the time a question between the officer, or the purchaser at his sale, on the one side, and the adverse claimant on the other. There is no pretence, nor does any one understand, that anything more is involved or concluded by such proceedings, than such title to the property as the defendant in attachment had when the levy was made.

Hence it is obvious that plaintiff in error is mistaken when he asserts that the suit in the Federal court drew to it the question of title to the property, and that the suit in the State court against the marshal could not withdraw that issue from the former court. No such issue was before it, or was likely to come before it, in the usual course of proceeding in such a suit.

It is true, that if under the intimations in *Freeman* v. *Howe*, the claimant of the property had voluntarily gone before that court and asked by petition that the property be released from the attachment and restored to his possession, he might have raised such issue, and would have been bound by its decision. But no such application was made, no such issue was in fact raised, and no such issue belonged ordinarily to the case. We see nothing therefore in the mere fact that the writ issued from the Federal court, to prevent the marshal from being sued in the State court, in trespass for his own tort, in levying it upon the property of a man against whom the writ did not run, and on property which was not liable to it.

JUDGMENT AFFIRMED WITH COSTS.

McANDREWS v. THATCHER.

The liability of a cargo to contribute, in general average, in favor of the ship, does not continue after the cargo has been completely separated from the vessel, so as to leave no community of interest remaining.

This principle illustrated in the following case:

A ship was stranded near her port of destination, and the underwriters upon her *cargo* sent an agent to assist the master in getting her off. The master and agent made all proper efforts to do this, for two days; when not succeeding at all, and the water increasing in the vessel, they began to discharge the cargo in lighters, still making efforts to save the ship. This discharge of the cargo occupied four days; by which time the whole of it was taken off, and, with the exception of a very small fraction in the lower hold and not discovered, taken to the ship's agents, who subsequently delivered it to its consignees, they giving the usual

Statement of the case.

average bond. By the time that the cargo was thus all got off, the vessel, not assisted by being lightened, was settling in the sand, with the tide ebbing and flowing through her as she lay. The agent considering her case hopeless, and the consignees of the ship having refused to authorize him to incur any further expense, now went away.

On the next morning, and while the master was yet aboard, the underwriters on the vessel sent *their* agent, who got to work to float the vessel. Soon after the new agent came, the crew refused to do duty. The agent got new hands, and the crew went away. They were soon followed by the master, he leaving the vessel after the new agent had been in charge of her for four days. After six weeks' labor, and an expenditure of money somewhat exceeding her value when saved, the new agent succeeded in floating and rescuing the ship. The remnants of the cargo, in a damaged state, were delivered to its consignees.

On a suit by the owners of the ship against the consignees of the cargo, for contribution in general average for the expenses incurred after the master went away—

Held, that the case was not one for contribution; there having been, as the court considered, no community of interest remaining between the ship and cargo, after the master, in the circumstances of the case, had left the ship.

THE ship Rachel, owned by Thatcher and others, of Boston, sailed from Liverpool for New York in July, 1859, with a cargo, consisting, among other things, of four hundred and four boxes of liquorice paste, consigned to McAndrews, in New York. The vessel, with her cargo, arrived in safety inside of Sandy Hook on the 21st of September; but, in coming up the bay, struck in a gale on the west bank, in the lower harbor, and became fast.

Regarding the ship and cargo as in peril, the master accepted the services of a steamer which that same day came alongside, to get her off. This steamer passed her hawser on board, and made fast; but, finding that her power was not sufficient to accomplish the object, she set a signal for another steam-tug. Another immediately came to her aid. The power of both combined was tried, but they could not start the ship from the place where she lay imbedded in the sand. These steamers continued their efforts for several hours. During this time a third steamer came alongside and made fast to the ship; but in her endeavor to start it parted her hawser, and all came to the conclusion that their efforts were fruit

less. The master, at six o'clock the same afternoon, left the ship and went to the port for advice and assistance; but the mate and mariners remained on board. At four o'clock on the following morning it appeared that there was fourteen and a half feet of water in the ship, and that this was fast increasing. The cargo was insured in New York and the ship in Boston. The underwriters of the *cargo*, with the knowledge and consent of the consignees of the ship, during the forenoon of the second day after the disaster, sent a steamer and their agent, a certain Captain Merrit, to the ship, for the purpose of saving, if possible, both it and the cargo. The steamer had a schooner in tow, and every necessary appliance—such as steam-pumps and wrecking apparatus—to rescue the ship, or, if necessary, to discharge the cargo. These continued their efforts, under the direction of the master, who had returned to his ship, for two days; but, finding that they were unable to get the ship off, they got to work to *discharge the cargo into lighters, and transport it to its place of destination.* The discharge of the cargo occupied four days, *i. e.* till the 26th of September; during which time three hundred and ninety-one boxes of the liquorice paste were taken off.

The cargo so discharged and transported was placed in the custody of the *agents of the ship, who, upon receiving the usual average bond, delivered the same to the consignees.* Efforts to get the ship off were continued by these parties until the said twenty-sixth of September, when the steam-pumps were taken down and carried away, having finished discharging the cargo. Before the agent left the vessel finally he went to New York and consulted with the consignees of the ship. These refused to authorize him to incur any further expense; the ship at that time, as positive testimony declared, having been settling in the sand, with the tide ebbing and flowing in her as she lay.

Intelligence of the disasters having reached the underwriters of the *ship*, they sent *their* agent, one Captain Morris, to the vessel. He went on board at one o'clock the next morning, after the other agent went away, and took charge

of her; but the crew soon afterwards came aft and refused to do duty. Deprived of their services, he went immediately to New York and employed other men to supply their places, and the crew left the ship. The next two days were spent in procuring oil casks, and in attempts to buoy the ship by their use, but without any beneficial result, except to save some of the materials of the vessel. It was found, on the next morning (that of the 30th), after a storm, that the ship, at her hatches, had eighteen feet of water, and as the sea was breaking over her, and she was apparently going to pieces, her main topmast was, by order of Morris, cut away.

The master, unable to do more than he had done, now abandoned the ship, and left her where she lay, in charge of Morris, the agent of her underwriters. Not discouraged by her condition, Morris continued his endeavors until the 11th of November following; and on that day, by the assistance of two steamers, *succeeded in getting her free*, and towed her up to the Marine Railway, at Hunter's Point, for repairs. The value of the ship as saved was somewhat less than the expense of getting her off after Morris came on board. Examination made at the Marine Railway showed that there were remnants of the cargo, in a damaged state,* including eleven boxes of the liquorice paste, not till then discovered, on board. These were discharged and delivered to the consignees.†

The ship-owners sued the consignees of the liquorice paste in the Circuit Court for the Southern District of New York, for $3363.89, adjusted as in the note for their ratable pro-

* One box had been lost overboard in discharging the cargo.

† The whole expenses on the saving of vessel and cargo were, $18,772 07
The expenses, after Morris came on board, ... 6,884 76
The ship as saved was valued at 6,758 00
The cargo (including sales of damaged), $24,600 and $298.84, . 31,754 66
The freight earned was 978 06
The sales of the whole of the defendants' consignment of 350 and 54 cases of liquorice was 11,747 28
Of that delivered from the ship after she got off, deducting charges, ... 182 50
The contribution of their consignment to the whole expense as adjusted, ... 3,363 89

portion of the expenses incurred in saving the ship after Morris came on board. The court below was of opinion that the claim was well founded in law, and charged accordingly.

Its opinion expresses so well one view which may be taken of the case that the reader will gain by having it entire:

"This is, perhaps, a close case, but we are inclined to think that, on principle, the cargo of the defendants is bound to contribute in general average to the expenses of saving the vessel. The fact that the vessel stranded near the port of destination has somewhat embarrassed the case, taken in connection with the circumstances attending the delivery of the cargo by lighters. It is open to the observation that the cargo was not only separated from the vessel and the common impending peril, before most of the expenses in relieving the latter were incurred, but that the separation took place at the instance and expense of the consignees of the cargo. This view, however, to the extent stated, is not sustained by the evidence. The cargo was discharged into the lighters to relieve the vessel; and the delivery then at the port of destination is attributable to the accident of the proximity of the port. The cargo was at the risk and responsibility of the ship until delivered by her consignees on receiving bond for average contribution.

"It is true, in a literal sense, that after the discharge of the cargo upon the lighters, and separation from the ship, the safety of the cargo no longer depended upon the saving of the vessel; and hence that there was no longer any common peril impending or benefit derived from the expenses incurred. But is this true in a more general view of the facts of the case, or in contemplation of law? By the accident which occasioned the stranding of the vessel, both the vessel and cargo were exposed to one common danger, and the expenses incurred were incurred with a view to the safety of both, and of course for their common benefit. Steam-tugs were employed, and efforts made to start the vessel from her sand bed—steam-pumps and wrecking apparatus used. These efforts failing, then commenced sending down yards and spars, and placing cargo into lighters. All these were expenses incurred, and efforts made by the master, who represented the interests of all concerned. These efforts were

continued by the master until and after he was joined by Captain Morris, the agent sent by the underwriters of the ship, who then took charge of the business.

"The question, under these circumstances, is this, Was the cargo exempt from all expenses incurred in relieving the ship after it was placed in safety upon the lighters? We agree that, if the consignees of the cargo had accepted it thus delivered, at the sides of the stranded ship, the separation would have been complete, and it would have been no longer connected with the danger or its incidents. But this cannot be pretended. The cargo continued as a part of the adventure not yet terminated. It cannot be doubted but if any damage had happened to it in the transfer to the lighters, or in the conveyance to the port, the loss would have been the subject of general average, and the ship liable for its share. And in this sense the cargo is still interested in the safety of the ship. It is said the consignees of the cargo do not claim any average contribution. But their release or waiver cannot affect the question. The test is, is the vessel legally liable?

"There is certainly a difficulty in laying down any general rule by which to determine the measure of expense the master or owner, in case of a vessel stranded by a peril of the sea, may incur, and to which the cargo saved must contribute. That expenses may be incurred, indeed that it is oftentimes the duty of the masters or owner to incur them, is not to be denied. We do not see but the measure of them must depend upon the exercise of sound judgment and good faith, under all the circumstances of the case. No fixed amount can be settled in advance. There may be abuses, as in every case where the rule of liability turns upon the exercise of the human judgment in the given case. The only remedy we know of consists in the supervision of the courts. We cannot say, in this case, that the owner should have ceased his efforts when the cargo was saved, or that he forfeited his right to the contribution by the continuance of them."

The jury having found in favor of the plaintiff for the $3363.89 claimed, and judgment having gone accordingly, the case was now here on exceptions and error.

Argument against the contribution.

Mr. Alexander Hamilton, Jr., for the plaintiffs in error:

1. The general rule will not be disputed that expenditures are not to be brought into general average, unless they are of an extraordinary character, and incurred for the *joint* benefit of ship and cargo.

In this case the cargo had been stored in safety at its place of destination before the expenses to save the ship, for which this action is brought, or any part of them, had been incurred.

Certainly when Captain Morris took charge of the ship, at the request of, and as agent for, the Boston underwriters on the ship, the cargo had been discharged into lighters by other parties, and safely stored at its place of destination, and the freight earned, or was due thereon. No further service was to be rendered to the cargo by the carrier, nor had he any further connection with it, save his lien for freight and charges. It was no longer at risk, and the separation from the ship was complete and absolute.

All expenses thereafter incurred upon the ship were made with a view to its preservation alone, and could not possibly benefit the cargo, or affect the freight in any way.

Of the three interests, therefore, two—cargo and freight—were no longer at risk, but, on the contrary, were absolutely secured, and entirely independent of the ship, whatever might be its fate. The ship itself was an absolute loss; the expenses of saving exceeding its value when saved.

Though the general principles which we here assert are well settled in mercantile law and practice, the adjudicated cases upon them are not numerous.

In England the first case affecting the question is *Sheppard* v. *Wright*, reported in Shower's Parliamentary Cases.* There a ship, laden with silk and oils, from Messina to London, was chased to Malaga by the French fleet. The factor of the *owners of the ship* sent a lighter to save what he could of the ship's cargo, and because the silks were of the greatest value, they were put on board of a lighter, with a small por-

* Page 18.

tion of the oil, and carried on shore. At night the French left the port, when the master ceased to land any more cargo. Some few days after the fleet again appeared, and the French got the ship and the remaining cargo. The silks were afterwards put on board another ship, and delivered to their owners in London. The action was brought by the owners of the ship and oils against the owners of the silks, to have contribution for their loss, but the bill was dismissed by the chancellor, which was affirmed upon appeal by the House of Lords. This was in 1698.

In the case of *Job* v. *Langton*,* the ship, with a cargo from Liverpool, ran on shore accidentally on the coast of Ireland. In order to get her off it became necessary to discharge the whole of her cargo, which was taken out and placed in store in Dublin. The ship was got off by digging a channel and employing a steam-tug. The cargo was shipped in another vessel and forwarded to its destination; but, for the purposes of the case, it was to be considered as having been carried on by the original ship after she had been repaired. The question was, were the expenses incurred after the cargo was in safety, in getting off the ship and towing her to Liverpool for repairs, chargeable in general average, or to the ship alone? Lord Campbell (all the court agreeing with him) held they were chargeable to the ship alone.

Connecting this case with that of *Moran* v. *Jones*,† subsequently decided in the same court, it will be seen that it was put upon the ground that the expenses claimed were incurred under an agreement made subsequently to the saving of the cargo, and were not part of a continuous series of measures for the safety of the cargo and ship jointly. The case at bar is like it. No objection is made by us to any part of the expenses incurred in removing the cargo and materials, down to the time that the cargo was safely landed and the ship practically abandoned by her consignees. The objection goes to the expenses incurred under Captain Mor-

* 6 Ellis & Blackburne (88 English Common Law), 779.

† 7 Id. (90 English Common Law), 532.

Argument in favor of the contribution.

ris's administration, after he was employed by the underwriters on the ship, twenty-four hours after the abandonment.

In *Job* v. *Langton* another fact appeared, to which the notice of the court is requested. The cargo in that case was of coal; and, when it was discharged, a very small part of it, to wit, fifty tons, were left on board the ship to "stiffen her." In this case a small remnant of cargo, bearing the proportion of one hundred and forty-fourth part of the whole, was also left on board, to be removed because it could not be got at; although, when Captain Morris went on board, he supposed there was no cargo in the ship, and acted upon that idea.

2. The stranding was involuntary, and, as a *cause* of loss or expense, did not give rise to a claim for contribution in general average.

3. The stranding occurred in entering the port of destination. In such cases expenses incurred in raising the ship are not general average.*

As the vessel, after the cargo was taken out, did not float, and was in fact a total loss—the expense of floating her exceeding her value when raised—it is clear, under the authorities, that these expenses cannot be brought into contribution in general average. †

Mr. Daniel Lord and Mr. George D. Lord, contra, for the ship-owners.

1. The ship and cargo, when stranded, were jointly exposed to a common and imminent danger of loss. Nor was the danger less common or less imminent because the stranding was near the end of the voyage. That it was *involuntary* did but make the peril the greater. Neither fact impaired the right to contribution.

The community of extraordinary peril commenced with the stranding, and did not terminate until the arrival of the

* 2 Arnould on Insurance, § 825, p. 889, Boston ed., 1849; Stevens on Average, 22

† Stevens & Benecke, Phillips's edition, 139-40; Marshall v. Garner, 6 Barbour, 394; 2 Phillips on Insurance, 3d ed., 117.

vessel and cargo at the place of safe delivery. The connection of vessel and cargo, as to common service, did not end before.

2. The whole saving, with its attendant expenses, was one continuous, unremitted operation, both in theory and in point of fact, from its beginning until the ship with the remnant of cargo reached the Marine Railway at New York. Although the effort was taken in hand finally by those who were *substitutes* for the original master and crew, yet the last, as the former, represented the owners of the ship, and in the line of their duty were acting as such representatives.

The vessel and cargo continued in the joint possession of the owners of the ship and their agents, and the cargo was not received from them until the various parts of the cargo had all arrived and been delivered at the end of the voyage; and had been received on the orders of the owners' agents, and subject jointly to a claim of general average. The consignment of defendants was not received or saved by them, separately or severally, or through any separate act of their own. It also was protected by a right of contribution in case of loss, while proceeding in the saving vessels from the shoal to the place of delivery in the city of New York. Indeed, a part of the defendants' consignment remained in the ship to the last, and was received by them from the ship's agents, at the city of New York, and sold by the defendants. Had this been of great value, it would not have been exempted from its contribution. But until actually delivered and sold, its value could not be ascertained. And, moreover, its value could not vary the principle of the liability, but merely the amount of its assessment. The defendants stand in the same condition as if all their consignment had been retained by the ship's agents, until received under a common bond of united responsibility.

3. It is contrary to the principle of general average to relieve any of the parts of the common adventure from its ratable share of contribution, by reason of its delivery being made successively, when made by the endeavors commenced and continued in common. The labor and expen-

diture of rescuing the part of an adventure first relieved, is chargeable on the residue of the cargo, and on the ship; because the latter are thereby relieved of part of the danger. The goods taken into lighters, on the relieving of the ship, are still at the risk of the ship and cargo, which their unlading or jettison first relieves. But as the ship and residue of the cargo are thus chargeable with a burden, they are equally entitled to relief and contributions from the cargo whose safety is promoted by it. Supposing the value of the ship and the freight in peril large, and that of the cargo small, if the cargo is relieved by common expenditures falling largely on the ship, the ship thus contributes largely for the saving of the cargo; the equity is the same, if the values are reversed and the cargo is made to bear more, according to its just proportion.

Adjudged cases support our view. *Bevan* v. *Bank of the United States*,* in the Supreme Court of Pennsylvania, may almost be said to be in point. The reporter's syllabus of the case runs thus:

"A vessel bound to Philadelphia, and having a large sum of specie on board belonging to the defendants, arrived in the bay of the Delaware, in the month of December, and after encountering various difficulties was stranded and ice-bound, near Reedy Island, in a situation of imminent peril. The specie was carried over the ice to the shore, and by land to Philadelphia, where it was delivered to the defendants. Some weeks afterwards the vessel reached Philadelphia in safety with the remainder of the cargo, which had been in whole or in part discharged into lighters, and afterwards reshipped. *Held*, that the defendants were liable to contribute to the charges and expenses incurred after the landing of the specie, as general average."

As in some degree illustrating the subject, we may next refer to *Bedford Commercial Insurance Co.* v. *Parker et al.*, in the Supreme Court of Massachusetts.† In that case, a ship insured was accidentally stranded within a few miles of her

* 4 Wharton, 301.

† 2 Pickering, 1.

port of destination. A., the owner of the cargo, which consisted of iron, saved part of it at his own expense. The insurers afterwards sent men on board, who endeavored without success to get the ship off, and at the same time the men employed by A. saved forty tons more of the iron. The two parties of men acted separately, though sometimes assisting each other. After this the insurers contracted to pay B. $2600, if he would get the ship off; and A. agreed that they might offer B. $600 for saving the iron, provided the ship should not be saved. B. got the ship off, and brought her to the wharf with 155 tons of iron on board. It was *held*, that the 155 tons were liable to contribute in general average to the $2600, though the rest of the iron was not.

Nelson v. *Belmont*, in New York,* is, perhaps, more in point. The following is an extract from the syllabus, which presents the *case as adjudged*. Some general observations in the opinion—*dicta* merely—need not be referred to, since they cannot operate in a counter way.

"The cargo of a vessel being on fire, the master transferred a quantity of specie to another ship, which by his request convoyed him into a port of distress. He there incurred expenses in putting out the fire and repairing damages to the vessel, the specie being meantime deposited in a bank. The damages were found to be such that the cargo was sold and the voyage abandoned. *Held*, that the specie was liable in general average for the expenses at the port of distress."

The counsel of the other side have referred to and commented upon *Moran* v. *Jones*, and have endeavored, perhaps, to explain it away. Here, again, we present the syllabus of the case, or its material parts. It seems to sustain our view.

"A ship was chartered to proceed from Liverpool to a foreign port. She took on board an outward cargo, and sailed. She was driven on a bank, by a storm, near Liverpool; and the cargo was rescued from her and carried to Liverpool, and there warehoused, the ship still remaining ashore in a situation of

* 21 New York, 36.

Reply against the contribution.

peril. Some days afterwards the ship was got off and taken to Liverpool, where she was repaired, and again took the cargo on board and proceeded on her voyage.

"The question for the court was, whether the expenses, incurred after the goods were in Liverpool in getting the ship off, without which she could not have proceeded on her voyage or earned the chartered freight, were general average to which ship, freight, and cargo were to contribute; or were chargeable to ship alone; or were chargeable on any other principle.

"The court drew the inference of fact, that the whole saving of the cargo and ship was one continued transaction; and on that hypothesis *held*, that the expenses were general average to which ship, freight, and cargo must contribute."

Reply: One position of the other side is, that a portion of the cargo was still on board, and, therefore, the separation was not completely made between ship and cargo.

An answer to this is, that the portion remaining was a mere damaged remnant under water, abandoned as not worth saving, and amounting only in value, to about $\frac{1}{1\,4\,4}$th part of the whole. Such a remnant—nothing to speak of—comes within the rule "*de minimis*," and cannot be allowed to drag after it into contribution the cargo saved as an entirety. To allow that would be refining too much. If such a remnant could be made use of to controvert the fact of the separation between ship and cargo, then no such separation would ever practically be made, for it is in the highest degree improbable where a vessel takes the bottom and is strained and injured by striking and rolling so as to lose her keel, and open her seams, that every particle of an assorted cargo shall be fully taken out of her.

Another and apparently better position of the other side is, that the efforts and expenditures to save the ship formed part of a continuous series of measures for the common benefit, and should, therefore, be justly brought into contribution with other expenditures incurred, and that all these expenses were defrayed by the parties to whom the master of the ship, as agent of all concerned, had consigned the vessel in the absence of her owners.

Reply against the contribution.

But the case shows that so far from there being a "continuous series of measures" to save, there were two distinct sets of efforts, by different parties, and different interests; the first being for the benefit of all; the second for one interest alone, undertaken when it appeared to be, and was, in fact, a desperate enterprise, leading to a waste of money.

As respects the authorities cited by my brothers Lord: The whole matter in the case at bar consists more in the application of a principle to facts not disputed than in anything else. To understand therefore how far the cases cited apply, it is necessary to state them more fully than the opposite counsel have done.

Bevan v. *The Bank of the United States*, is the first and the strongest case they have. There the plaintiffs were the owners of a ship which arrived in Delaware Bay in December, 1831, from New Orleans for Philadelphia, and became stranded in a situation of imminent peril. It was necessary to remove her cargo as in case of wreck. Among the first articles landed was a sum of specie belonging to the defendants. It was received on the ice in sleds, and immediately conveyed to the shore, on the morning of the 16th of December, 1831. It was then sent to Philadelphia, and on the following day delivered to the defendants. Eight weeks after, the vessel arrived in Philadelphia with the remainder of her cargo, which had been in whole or in part discharged into lighters and afterwards reshipped.

During the period of eight weeks a large number of additional charges had been incurred for the safety of the vessel *and the remainder of the cargo.*

In this case the question was, whether the expenses incurred in getting the ship into port after the specie had been sent forward should be brought into general average, including the specie, and it was held that they should.

The only ground upon which an argument can be made to sustain this decision is, that the same series of measures taken by the captain to save his ship and cargo continued to be taken by him up to the time that his ship and cargo

arrived in Philadelphia. In the case before the court no such fact exists.

Mr. Phillips, in his work on Insurance,* questions this decision, and shows that the passage in Benecke, the authority on which the case of Bevan mainly relies, is not analogous to the case in question, and that the case of the specie "does not," to use his language, "seem to be distinguishable from that of a part of the cargo being landed after arrival at the port of destination, and a subsequent general average loss on the ship and remainder of the cargo still on board, to which the part delivered would unquestionably not be liable to contribute; the remainder of the cargo, in the case in question, not having been delivered to the consignees, but landed and reloaded on the ship, being afloat again, continued to be within the ordinary category of contributory interest." So too the Court of Appeals of New York, in *Nelson* v. *Belmont*, discusses the opinion in the case, and doubts whether it can be sustained upon either of the grounds upon which it is put. For the purposes of this case, however, it is sufficient to say, that in its important facts it is so different, that it is not an authority to sustain the position of the defendant in error here.

The next case referred to, on the opposite side, is *Bedford Commercial Insurance Co.* v. *Parker*. In that case, the ship was on her voyage from a foreign port to New Bedford, and struck on a reef outside the harbor, about nine miles from the town. Shortly after she struck, the defendants, who were owners of *ship and cargo*, offered to abandon her to the plaintiffs, who were the underwriters. These refused to accept, but determined to save the ship if they could, the defendants agreeing that nothing done by the plaintiff with that object should prejudice them on the question of the defendants' right to abandon. Men were sent to the vessel by the plaintiffs to save what they could of the sails and rigging, and some of the iron of which the cargo consisted was taken out by them and carried to New Bedford. A

* Vol. 2, § 1407: see also 1 Parsons on Maritime Law, 326.

large quantity of iron was saved, also, by men employed at the expense of the defendants. Considerable quantities of iron were taken out of the hold, and some of the men employed by the plaintiffs aided by pumping and otherwise to save the cargo; but during the time the defendants had men on board who were employed by them at their expense in getting out the iron. Forty tons of iron were taken from the ship and were brought to New Bedford by a sloop in the employment of the plaintiffs, but the defendants had vessels there, ready to have taken it. The labor and difficulty in saving it was in getting it from the ship's hold, and this was done by the defendants' men. After this, the directors of the company authorized two of their number to offer $2000 as a compensation to any one who would undertake to get the ship off, the contractor to be paid nothing unless he should succeed, and with the consent of Parker, one of the defendants, the agents were to offer $600, provided the iron should be all taken out, and the vessel should not be removed; and so in a certain proportion for so much iron as should be taken out.

The agents contracted with one Delano, engaging to pay him $2600 if the vessel and the whole cargo should be made secure, but no express stipulation was made relative to the iron separately. It was understood, however, that the contractors were to be paid in proportion to what might be saved, to the extent of $600. They got the vessel off and brought her safely into the harbor, having about 155 tons of iron still on board. The ship was also repaired by the defendants, the parties to the policy having agreed that the insurer should pay $1750 for repairs necessary upon the ship.

It was also in evidence, that when the plaintiffs settled their accounts with the laborers, who also assisted in saving the iron, they refused to pay those men who were engaged by the defendants. These parties of men acted separately, though sometimes assisting each other.

The question was, what part of the cargo, if any, should contribute to the expenses of raising the ship, and the court

Reply, against the contribution.

held that only that part of the cargo that was in her when she was raised should contribute to the expenses of raising her.

This case is, in fact, an authority against the plaintiff in error. It is parallel with that now before the court, except that in the case in Massachusetts, the ship and cargo were owned by the same persons, who separated to some extent from the underwriters, in their efforts to save their several interests;—while in this case the owners of the cargo and ship being different persons, acted in concert down to the time that the underwriters on the ship took sole possession of her.

In *Nelson* v. *Belmont*, the next case referred to, the Galena sailed from New Orleans for Havre with a cargo of cotton and $30,853 in specie belonging to the defendant. On July 23, 1853, the vessel was struck by lightning in the Gulf Stream, and was found to be on fire in the hold. After attempting to extinguish it, a Danish vessel came in sight, and the passengers and their baggage were transferred to her. On the following day an arrangement was made with the Danish captain by which he was to take the specie on board his vessel and accompany the Galena to Charleston. This was done because he had the passengers on board and as a protection to the crew in case they had to leave the Galena. The specie was transferred because if the fire broke out it might be too late to remove it from the Galena. Both vessels reached Charleston. Engines of the city poured water into the Galena till she filled and sank to the upper deck. The cotton absorbed a good deal of water, very little of it having been previously injured, and the captain determined to abandon the voyage. He sold the cargo there and remitted the proceeds. While in the harbor and before reaching the wharf, he got the specie from the Danish vessel and deposited it in the bank. The question was whether the specie was liable to contribute in general average to the amount paid for the services of the Danish brig, the expenses at Charleston of sinking and raising the vessel, the repairs, and damage to the cotton by water, &c.

In delivering the opinion of the court, Selden, J., says:*

"My conclusion is, notwithstanding the case of *Bevan* v. *United States Bank*, that if the owner of any portion of the cargo, even after a peril has occurred, and after a series of measures to avert it has commenced, can succeed in so separating his own property from the rest that it is no longer in any case at risk, he cannot be held liable to contribute to the expenses subsequently incurred."

After some remarks upon the term "at risk," he goes on to indicate where the line of distinction lies:

"If the voyage is not abandoned, and the property, though separated from the rest and removed from the ship, is *still under the control of the master and liable to be taken again on board, for the purpose of being carried to its destined port*, the relations of the several owners are in no respect changed."

These expressions show what would have been the decision in a case like the present one. They are not *dicta*, either; but expressions which show the general view of the court on the point here in issue. On precedent and on principle, therefore, we think the case (even if a "close" one) is with us. On the English cases, we have already remarked.

Mr. Justice CLIFFORD delivered the opinion of the court.†

Views of the defendants are, that the case, as stated, is not a case for contribution in general average, and that the court erred in instructing the jury that the plaintiffs were entitled to recover.

Primary proposition maintained by the defendants is, that expenses incurred in a voyage, although they were necessary and proper, are not to be carried into general average unless they were of an extraordinary character, nor unless it appears that they were incurred for the joint benefit of the ship and cargo; and that inasmuch as it appears in this case that the cargo had been stored in safety, at the place of destination, before the expenses, for which the suit was com-

* Page 42.

† Field, J., not having sat.

menced, were incurred, the claim of the plaintiffs cannot be sustained.

Decision and judgment in the case must depend upon the question, whether the several sums expended by the agent of the underwriters of the ship, after he went on board and took charge of the vessel and the men and means employed to save her, were properly carried into the adjustment; because it is plain that if those sums are not properly included in the expenses of general average the judgment should be reversed.

I. Sacrifices, voluntarily made in the course of the voyage, of part of the ship or cargo, to save the residue of the adventure from an impending peril, or extraordinary expenses incurred for the joint benefit of both ship and cargo, and which became necessary in consequence of a common peril, are usually regarded as the proper subjects of general average.

All losses which give a claim to general average contribution, says a standard writer upon the law of insurance, may be divided into two great classes:

1. Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing.

2. Those which arise out of extraordinary expenses incurred for the joint benefit of both ship and cargo.*

Present case, if the defendants are liable at all, falls within the latter class, and, consequently, it will not be necessary to remark upon the former class, although cases of jettison are much more frequently presented for decision than cases growing out of the stranding of the vessel. Stranding in this case was involuntary; but it cannot be doubted that the ship and cargo were jointly exposed to a common peril, and were in imminent danger of being wholly lost. Such being the fact, it is clear that the expenses of saving the ship and cargo were a proper subject of joint and ratable contribution in general average by vessel, freight, and cargo, provided the vessel and cargo were saved by the same series of mea-

* 2 Arnould on Insurance, 881.

sures during the continuance of the common peril which created the joint necessity for the expenses.*

Undoubtedly, the community of extraordinary peril commenced with the stranding of the vessel; but the question is, where it terminated? Three theories may be suggested:

1. That it terminated when the cargo was separated from the ship, and was transported to the port of destination and delivered to the consignee.

2. That it terminated when the master, acting in good faith as the agent of all concerned, yielded to the necessities of his situation and abandoned the endeavors to save the ship, and left her where she was stranded, in charge of the agent of her underwriters.

3. That it did not terminate until the ship was got off from the bank where she was stranded, and arrived at the marine railway for repairs in her port of destination.

Theory of defendants is substantially expressed in the first proposition; but the plaintiffs insist that the community of peril did not terminate until the arrival of the vessel at the port of destination; and if not, then the charge of the court was correct, and the judgment of the court must be affirmed.

Natural justice requires that where two or more parties are in a common sea risk, and one of them makes a sacrifice or incurs extraordinary expenses for the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure; or, in other words, the owners of the other shares are bound to make contribution in the proportion of the value of their several interests.†

Courts universally admit that the Rhodian law was the parent of maritime contribution, although, in terms, it made no provision for any case of general average, except for that of jettison of goods as the means of lightening the vessel. But the rule, as there laid down, has never been understood as being confined to that particular case, but has always

* Benecke & Stevens on Average, 96; Bally on Average, 45, 71; Birkley v. Presgrave, 1 East, 220; Addison on Contracts, 490.

† 2 Phillips on Insurance, 65; Holt on Shipping, 482.

been regarded as a general regulation, applicable in all cases falling within the principle on which it is founded.

Principle of the rule is, that "what is given for the general benefit of all, shall be made good by the contribution of all;" and hence it is that losses, which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo, are as clearly to be carried into the adjustment as those which arise from sacrifices of part of the ship or part of the cargo.

Settled rule, also, is, that when a vessel is accidentally stranded in the course of her voyage, and by labor and expense she is set afloat, and completes her voyage with the cargo on board, the expense incurred for that object, as it produced benefit to all, so it shall be a charge upon all, according to the rates apportioning general average.*

In case of accidental stranding, says Mr. Phillips, the expenses incurred for getting off the vessel, as far as they are incurred for the purpose of saving the ship, cargo, and freight, and are common to all those interests, are a subject of contribution by all. Expenses, however incurred for any separate interest, he says, are wholly chargeable to that interest, and there can be no doubt that the proposition, as stated, is correct as a general rule, and yet it is apparent that there will often be difficulties in its application. Foreseeing those difficulties, the same author attempts to obviate them by three practical illustrations, which it becomes important to notice:

1. That if the ship is got off without discharging the cargo, or by discharging only a part of it, then the whole expense is general average, unless the vessel needs repairs; but if she needs repairs, those are particular average.

2. That if the vessel does not float when the whole cargo is discharged, the subsequent expenses do not concern the cargo, but are particular average on the vessel in the same manner as repairs.

* Bedford Commercial Insurance Company v. Parker, 2 Pickering, 7; Benecke & Stevens on Average, 189.

3. That goods, when landed from a stranded ship, and delivered to the consignee, cease to be liable to contribute for expenses subsequently incurred.

Unquestionably, the rule enunciated in the first illustration is correct; but grave doubts are entertained whether the second and third can be admitted *in all cases* without important qualifications.

Although the stranded vessel may not float, as a consequence of the unlading of the goods, still she may be so lightened by the operation, that the usual appliances at hand may be amply sufficient to enable the master to rescue the vessel without much expense or delay, and put her in a condition to receive back the cargo and transport it to the port of destination; and, in the case supposed, it cannot be doubted that the expense of saving the vessel, as well as the expense of preserving and reloading the cargo, would be the proper subject of general contribution.

So, where the cargo consists of various consignments, and the vessel is stranded in the harbor of the port of destination, it will seldom or never happen that all the consignments will be delivered at the same time. On the contrary, some of necessity will be delivered before others; and yet, if the unlading of the cargo has the effect to make the vessel float, and the whole adventure is saved by one continued, unremitted operation, under the directions of the master, as the agent of all concerned, it would seem that the case was one falling directly within the equitable principle of general average, which requires that all the interests shall contribute for the expenses incurred to save the whole adventure from common peril.*

Unless the rule is so, a new statement of the adjustment would be necessary upon each respective part of the cargo delivered as they successively reached a safe destination, which would be impracticable, and contrary to the usual course of adjusting such losses.

On the other hand, it is an undoubted rule that goods, or

* Benecke & Stevens on Average, 141, and note.

any interest, are not liable to contribute for any general average or expenses incurred subsequently to their ceasing to be at risk; because all that was not actually at risk at the time the sacrifice was made or the expense incurred was not saved thereby, and no interest is compelled to contribute to the loss or expense which was not benefited by the sacrifice.*

II. Light is shed upon this inquiry by referring to the duty of the master, who, in case the vessel is stranded, becomes the agent of all concerned. Duties remain to be performed by the master, as the agent of the owner or of all concerned, after the voyage is suspended by the stranding of the vessel. His duty is, if practicable, to relieve the ship and prosecute the voyage; and his obligation to take all possible care of the goods still continues, and is by no means discharged or lessened while it appears that the goods have not perished with the wreck. Safe custody is as much the duty of the carrier as due transport and right delivery; and when he is unable to carry the goods forward to their place of destination by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which human skill and prudence could prevent.†

Conscious of the nature and extent of his obligations, the master accepted the services of the several steamers which went to the relief of the ship, and continued his endeavors to save both ship and cargo until the latter was safely delivered at the port of destination, and until the consignees of the ship declined to authorize any further expense.

Evidence, as reported, is satisfactory that the master acted throughout in good faith, and there is not the slightest ground to conclude that he was wanting either in personal energy or in nautical skill. Take the circumstances as detailed in the statement of the case, and it is clear that he

* 2 Phillips on Insurance, § 1407; 2 Arnould on Insurance, § 838.

† The Propeller Niagara, 21 Howard, 27; King v. Shepherd, 3 Story, 358; Elliot v. Russel, 10 Johnson, 7.

could not have been justified in doing less than he did; but the question is, whether or not he was required to do more? Plainly his duty was not ended when the vessel was stranded, nor even when the cargo had been removed for the double purpose of saving it and of lightening the ship, as a part of the means adopted to get her off.

Means devised on the occasion were such as are usually employed for the purpose, and not a doubt is entertained that if the master had been successful in saving the ship as well as the cargo, the whole expense, inasmuch as it was the result of one continuous, unremitted operation, would have been properly regarded as a general average expenditure. Where the ship is stranded, much is necessarily confided to the discretion of the master; and if the ship had been saved through the means which he employed, it is clear that the expenditure would have fallen directly within the definition of general average, as given by the best writers upon the subject.

III. General average denotes that contribution which is made by all who are parties to the same adventure towards a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, by some of them, for the common benefit of ship and cargo.

Usual conditions annexed to such a loss, in order that it may be the object of such contribution, as generally stated, are, that it must have been of an extraordinary nature, advisedly incurred, under circumstances of imminent danger, for the common benefit of ship and cargo; and it must have aided at least in the accomplishment of that purpose.*

Suggestion is, that the cargo was separated from the ship; but the mere fact that the cargo is unladen, although it is done in part for the purpose of saving the goods, yet, if it is also done for the purpose of lightening the vessel, and as a means of causing her to float, and of saving her from the common peril, will not necessarily divest the transaction of

* M. & P. on Ship. 320; Maclachlan on Shipping, 556; Smith's Mercantile Law, 6th ed. 336; Barnard v. Adams, 19 Howard, 270.

its character as an act performed for the joint benefit of the ship and cargo.

Except when the disaster occurs in the port of destination, or so near it that the voyage may be regarded as ended, the master, if the goods are not perishable, has the right, and if practicable, it is his duty to get off the ship, reload the cargo, and prosecute the voyage to its termination.

Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladed and stored in safety are not relieved from contributing towards the expenses of saving the residue, nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures.

Ship and cargo were in imminent danger from a common peril, and, under those circumstances, it was the duty of the master, as the agent of all concerned, to use his best endeavors and employ his best exertions to save the whole adventure.

Viewing the matter in that light, his first efforts were directed to the object of relieving the vessel by means of the steamers which came alongside; but, finding that the ship was too fast in the sand to be got off by those means, he commenced to discharge the cargo, to save the goods and lighten the ship as, apparently, the best possible measure which could be adopted to save the whole adventure.

IV. None of these propositions are controverted by the plaintiffs; but they insist that the subsequent expenses incurred by the agent of the underwriters of the ship should also be carried into the adjustment, and that the cargo saved by the master should be adjudged liable to contribute towards the expenses incurred by the agent of the underwriters of the ship in accomplishing, at the end of six weeks, what the master abandoned as hopeless and as a total loss.

Before the last-named agent came on board, the master, ascertaining that the consignees of the ship would not au-

thorize any further expenditure, had dismissed the steamers that went to the aid of the ship and had sent back to the port all the steam-pumps and wrecking apparatus he had employed in his endeavors to save the ship as well as the cargo, and had, in fact, decided to abandon the ship as a total loss, and left her in charge of the agent of her underwriters.

Prior to that decision the cargo, except a few remnants of small value, subsequently found in the lower hold, had been discharged into lighters and transported to the place of destination, and had been delivered into the possession of the consignees.

Having saved the cargo, and finding that further efforts to save the ship with the means at his command were fruitless, he relinquished his endeavors and abandoned the undertaking.

Such are the undisputed facts of the case, and, under the circumstances, it is not possible to hold that the ship, as subsequently got off, was, as matter of fact, saved by a continuation of the same series of measures as those by which the cargo was saved.

Complete separation had taken place between the cargo and the ship, and the ship was no longer bound to the cargo nor the cargo to the ship.

Undoubtedly the doctrine of general average contribution is deeply founded in the principles of equity and natural justice, but it is not believed that any decided case can be found where the liability to such contribution has been pushed to such an extent as that assumed by the plaintiffs.*

V. First case cited for the plaintiffs is that of *Bevan* v. *United States Bank*,† which is the strongest reported case in their favor. Plaintiffs were the owners of the vessel, and the defendants were the owners of a certain quantity of specie, which constituted a part of the cargo. Voyage was

* Slater v. Rubber Co., 26 Connecticut, 129; Nemick v. Holmes, 25 Pennsylvania State, 371.

† 4 Wharton, 301.

from New Orleans to Philadelphia; and the vessel was stranded in Delaware Bay in a situation of imminent peril. Statement of the case shows that the specie was among the first articles landed, and it was immediately sent overland to the port of destination, and on the following day was delivered to the defendants. Eight weeks afterwards the vessel reached the same port in safety with the remainder of the cargo, which had been discharged into lighters and was afterwards reshipped. Supreme Court of Pennsylvania held that the defendants were liable to contribute in general average to the charges and expenses incurred subsequently to the landing of the specie.

Much stress is laid, in the opinion of the court, upon the fact that the vessel and the residue of the cargo left on board, were subsequently brought into port by the extraordinary exertions of the master; and if the conclusion can be sustained at all, it must be upon the ground that the whole adventure was saved by a continuous series of measures, prosecuted by the master as the agent of all concerned, which commenced with the saving of the specie, and ended with the saving of the vessel and the residue of the cargo. Stranding in that case was outside of the harbor of the port of destination, and there was no abandonment of the vessel, nor any suspension in the endeavors of the master to save the entire adventure. But the statement of the case shows that the master and mariners remained on board, and that they saved the ship, and having returned the residue of the cargo to the ship, the same was duly transported to the place of destination.* Standard text-writers have doubted the correctness of that decision;† but it is unnecessary to determine the question at the present time, as it is clearly distinguishable from the case before the court.

Second case cited is that of *Bedford Com. Ins. Co.* v. *Parker et al.*,‡ which can scarcely be reconciled with the preceding

* Lewis v. Williams, 1 Hall S. C., 436; Gray v. Waln, 2 Sergeant & Rawle, 289.

† 1 Parsons' Mercantile Law, 326; 2 Phillips on Insurance, § 1407.

‡ 2 Pickering, 1.

case. Insurers of the ship were the plaintiffs, and the defendants were the owners of the cargo. She was stranded nine miles from the port of destination. Part of the cargo was saved by men employed by the owners of the same, at their own expense. Other parts of the same were subsequently saved by the underwriters of the ship; and it appears that at one time the latter had a hundred men employed in efforts to save the cargo, and the sails and rigging of the vessel. They afterwards entered into a contract with a third party, and agreed to pay a certain sum if he would save the ship and the residue of the cargo.

Reported facts show that the contractor ultimately succeeded, and brought the ship and such part of the cargo as remained on board, safely into the harbor; and the court held, and well held, that only that part of the cargo which was on board when the contract was made, was liable to contribute in general average to pay the amount as stipulated in the contract. Clear inference, from the statement of the case, is, that the master had abandoned the ship, and that he had no participation in the previous endeavors to save the cargo. Decision was, that everything which is saved in such a case, by common expense and labor, shall contribute to pay that expense in proportion to its value; but the court decided that the part of the cargo taken from the vessel by the owners, before the contract was made, was not saved by the successful efforts of the contracting party, and there can be no doubt that the decision was correct.*

Earliest case upon the subject is that of *Shepherd* v. *Wright*,† which was an appeal from a decree in the Court of Chancery. Appellants shipped a part of the cargo, and were the owners of the ship, and the residue of the cargo belonged to the respondents. Ship sailed from Messina, bound to London, and on the voyage she was chased by an armed vessel into Malaga. Advised of the danger, the factor of the ship sent lighters to the master, to save what he could of the cargo;

* Columbia Insurance Co. v. Ashby, 13 Peters, 331.

† Snowers's Parliamentary Cases, 28.

and as the goods of the respondents were silks, they were first carried on shore. Night came, and the armed vessel left, and as the danger no longer continued, the master forbore to land any more of the goods. Six days afterwards the armed vessel returned, and captured the ship and the goods on board, belonging to the appellants.

They brought the bill of complaint against the respondents, to compel contribution; but the chancellor dismissed the bill of complaint, and the decree was affirmed in the House of Lords. Ground of the decree was, that the appellants' loss did not contribute to the preservation of the respondents' shipment. Whole adventure was saved from the first peril, and the shipment of respondents was not exposed to the second, by which the ship and the appellants' goods were lost. Evidently the case was rightly decided, and it is perfectly consistent with the views herein already expressed.*

Third case cited by the plaintiffs is that of *Nelson* v. *Belmont*,† which has an important bearing upon the question under consideration. Plaintiff in that case being the owner of the ship, claimed general average contribution of the defendant, as the shipper of a certain amount of specie. Intended voyage was from New Orleans to Havre; but the ship was struck with lightning in the Gulf Stream, and was obliged to make a port of distress. Unable to extinguish the fire, the master signalled a vessel in sight, and accepted assistance. He transferred the specie to the other vessel, and the arrangement was, that the other vessel should accompany the vessel in distress to Charleston; but after arriving in the harbor, and before the vessels reached the wharf, the master took back the specie, and subsequently deposited it in bank. Damage was done to the residue of the cargo by the fire; and the means adopted to extinguish the fire, after the vessel reached the wharf, caused her to sink, and the master was obliged to incur expense to raise the vessel, in order to prosecute the voyage. Judgment of the Court of Appeals was, that the specie was liable, in

* Benecke & Stevens on Average, 61.

† 21 New York, 88.

general average, for the amount paid for the services of the other vessel, and for the expenses incurred at the port of distress.

Precise doctrine advanced was, that the liability to general average continues until the property has been completely separated from the rest of the cargo, and from the whole adventure, so as to leave no community of interest remaining. Majority of the court went farther, and held that if the voyage is not abandoned, and the property, although separated from the rest, is still under the control of the master, and liable to be taken again on board for the purpose of prosecuting the voyage, the common interest remains, and whatever is done for its protection, is done at the common expense. Correctness of that decision cannot be doubted; and yet the question may often arise in practice, whether in a given case the separation is, or is not so complete as to justify the conclusion that no community of interest remains. Close cases may doubtless arise, but it is believed that in general there will not be much difficulty in ascertaining the true line of distinction.

VI. Where a ship was stranded by perils of the sea, and in order to lighten the vessel, the cargo was discharged and forwarded in another vessel, and subsequently *new measures* were adopted, and additional expenses were incurred in getting the ship off and taking her into port for repairs, it was held that the expenses incurred from the misadventure until the cargo was discharged, constituted a general average, but that the subsequent expenses were particular average, and chargeable only to the ship.*

Statement of facts shows that it became necessary to cut a channel for the vessel, and employ a steam-tug in order to get the vessel off; and the view of the court was, that the goods had been previously saved by a distinct and *completed operation*, and that afterwards a new operation began for the benefit of the ship-owner.

* Job *v.* Langton, 6 Ellis & Blackburne, 779; M. & P. on Ship. (3d ed.), 822.

Judgment, in that case, was given by Lord Campbell, and in a subsequent case he repeated and enforced the reasons on which the former judgment rested.* Voyage, in the last case, was from Liverpool to Callao. Ship was driven on a bank by a storm, near the port of departure. Cargo was discharged and transported back to the port whence it came, and some days afterwards the ship was got off, taken to the port, and repaired, and again took the cargo on board and proceeded on the voyage; and it was held that the saving of the ship and of the cargo was one continued transaction, and that the expenses were general average, to which the ship, freight, and cargo must contribute. Considering that the goods remained under the *control of the master* until the ship was got off, repaired, and was enabled to take the goods on board and prosecute her voyage, it is clear that the decision was correct, and entirely consistent with the previous adjudication.†

Applying those principles to the present case, we are of opinion that there was no community of interest remaining between the ship and the cargo when the master, as declared in the statement of the case, abandoned the ship, and left her in charge of the agent of the underwriters, after the consignees of the ship had declined to authorize the master to incur any further expense.

Judgment of the Circuit Court is therefore reversed, and the cause remanded, with directions to issue a

NEW VENIRE.

BROWN v. TARKINGTON.

Promissory notes given for a balance found due on settlement in a transaction itself forbidden by statute and illegal, or for money lent to enable a party to pay bills which the person taking the promissory notes

* Moran v. Jones, 7 Ellis & Blackburne, 582.

† Maclachlan on Shipping, 573, 576.

had himself assisted, in violation of statute, to issue and circulate, cannot be enforced.

2. The fact that such promissory notes are given for a balance found due, or to enable a principal party in the illegal transaction to pay notes that have got into public circulation and are unpaid, does not purge them from the infirmity which belonged to the original vicious transaction.

3. Where a deposition, after a motion on grounds set forth has been unsuccessfully made at one term to suppress it, as irregularly taken, is at another read on trial without objection or exception, it cannot be objected to here on the grounds that were made for its suppression, or at all.

THIS was a writ of error to the Circuit Court of the United States for the District of Indiana.

The case was this: The suit was brought by Brown, the plaintiff in error, to recover against Tarkington and others, defendants, the amount of four promissory notes, and another small sum, in the aggregate exceeding twelve thousand dollars. The defendants were stockholders in the Bank of Tekama, in the Territory of Nebraska, organized under a charter granted by the legislature, February 13, 1857. The notes were signed by its president, S. L. Campbell.

By an act of Congress passed July 1, 1836, it was provided, "that no act of Territorial legislature of any of the Territories of the United States, incorporating any bank, or any institution with banking powers and privileges, hereafter passed, shall have any force or effect whatever, until approved and confirmed by Congress." The charter of this bank, as already observed, was passed in 1857. Three of the notes were given on the 9th June, 1858, and the fourth on the 28th April of the same year. The consideration of the three notes of the 9th of June, was for a balance due the plaintiff from the Bank of Tekama *on a settlement of accounts;* and of the other, for moneys advanced to Campbell, the president, *to enable him to redeem the paper of the bank in circulation.*

Much evidence was given, in the course of the trial, tending to prove that the plaintiff was connected with the officers and directors of the bank in conducting its operations, in aiding and assisting, personally, and by his credit and means,

to extend the circulation of its bills; and also tending to prove that the plaintiff was familiar with the charter of the bank, and the articles of association, and knew of the illegality of the association, and participated, in common with the officers and directors, in very unscrupulous, if not fraudulent contrivances, to keep up the credit of the bank and its bills, to the injury and loss of the business public, after they had knowledge of its utter insolvency and inability to redeem the paper already in circulation.

Indeed, it was apparent from the evidence that the institution possessed very little, if any, capital, during the whole term of its existence. The nominal capital was $300,000, divided into shares of one hundred dollars each, payable in instalments of ten dollars each. The third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth instalments were made due and payable at such times as the board of directors might designate. The bank began business in September, 1857, and ceased in the May following, with an outstanding circulation of its bills of some ninety thousand dollars.

In the course of the trial the plaintiff read without objection the deposition of Campbell; and, of course, being thus read, no exception was taken to it. The record however disclosed the fact that at *a former term* there had been a motion to suppress and exclude this deposition, as not having been taken in conformity with the 30th section of the Judiciary Act of 1789, under which the counsel moving to suppress, assumed it to have been taken; and disclosed also the fact that the motion had been overruled.

At the trial, the court below, after referring to the act of Congress forbidding the Territorial legislature to pass any law chartering a bank without its consent, and to the violation of this organic law in the present charter, and to the facts which had been proved, instructed the jury that the charter and the organization of the bank under it, as well as the banking business conducted and carried on through the means of this organization, were all illegal and void; and that if the plaintiff participated in these transactions, aiding

and assisting the officers and directors in giving credit to the bank, and to its bills in circulation, thereby co-operating in the imposition and fraud upon the business community, with a knowledge of the illegality of the charter and of the organization of the bank, and that the consideration of the notes in question grew out of these illegal transactions, he was not entitled to recover.

Verdict and judgment went accordingly for the defendants.

On error here, *Mr. G. M. Lee, for the plaintiffs*, contended that various instructions requested below and which he presented,—but which, as having been aside from the ground on which the case was put before the jury, need not perhaps, here, by the reporter, be particularized—were not given by the court below, as asked. He argued further that the charge as given was, in itself, wrong: for conceding *argumenti gratiâ*, what was otherwise not to be conceded,—to wit, that the bills of the Tekama Bank as originally issued were not obligatory on the persons by whose authority they were put forth—still that here the plaintiff, in so far as he lent his money to the defendants to enable them to *pay* debts, and the *payment* of which was not illegal whatever the incurring of them might have been—was not censurable, but, contrariwise, praiseworthy; that here too was a promise, not the immediate nor necessary offspring of the old acts, nor tainted by their infirmity, if they had any; and that thus standing on its own and on new ground, such promise was good.* He contended that the court below had disregarded the purpose to which part of the money was applied, and disregarded the new and independent promise; and by charging, substantially, that if the plaintiff had furnished funds to enable the bank to do business he could not recover, had cast into the background or out of view entirely,

* Petrie v. Hannay, 3 Term. 418; 6 Id. 410; Bird v. Appleton, 8 Id. 562; Faikney v. Reynous, 4 Burrow, 2069; Farmer v. Russell, 1 Bosanquet & Puller, 296; Ex parte Bulmer, 13 Vesey, 313; Hodgson v. Temple, 5 Taunton, 181; Toler v. Armstrong, 4 Washington, 297; Armstrong v. Toler, 11 Wheaton, 258; Catts v. Phalen, 2 Howard, 376.

one of the most salient and distinguishing features of the case; herein, he argued, committing error in the charge.

Mr. Eames, contra.

Mr. Justice NELSON delivered the opinion of the court.

We perceive no valid objection to the charge given by the learned judge below. It referred to the facts with great particularity and accuracy. The principle of law which it laid down is familiar, and the evidence in the case called for its application. The illegality of the charter of the bank, and of the organization under it, as well as the business of banking conducted through its means, were matters not in controversy upon the evidence. The only material question open was, whether or not the plaintiff was *particeps criminis?* If he was, he was disabled, under the maxim, to recover. The law leaves the party thus situated where it finds him. If either has sustained loss by the bad faith of his associates, it is but a just punishment for the illegal adventure.

To the argument of the counsel for the plaintiff—that admitting the banking transactions to be illegal, yet that the settlement of the balance and giving notes for the same purged the new promise, as he calls it, from the original taint—the answer is, that the new promise is founded upon the illegal consideration; a debt or demand growing out of the illegal transactions: and is as infirm, in the eye of the law, as the implied promise that existed previous to the giving of the notes.

There were several prayers for instructions on the part of the plaintiff, which were refused in the form presented. Most of them were irrelevant and immaterial, and neither even alluded to the ground upon which the case was placed before the jury. The court embraced in its charge all that was material or pertinent in the instructions prayed for.

It is also insisted for the plaintiff that the deposition of S. L. Campbell, the president of the bank, was improperly admitted on account of an irregularity in taking it under the act of Congress. It appears that a motion had been

made, at a previous term of the court, to set aside this deposition on the ground stated; which was denied. On the trial, when the deposition was offered, no objection was made to it. The question, therefore, is not in the bill of exceptions; on the contrary, if any valid objection existed, it was waived by not taking advantage of it at the trial.

JUDGMENT AFFIRMED.

[See *Orchard* v. *Hughes*, 1 Wallace, 78; *Brooks* v. *Martin*, 2 Id. 70.—REP.]

McGuire v. The Commonwealth.

(MOTIONS.)

1. Where a party is indicted in a State court for doing an act contrary to the statute of the State, and sets up a license from the United States under one of its statutes, and the decision of the State court is against the right claimed under such last-mentioned statute, this court has jurisdiction under the 25th section of the Judiciary Act of 1789.
2. A writ of error from this court is properly directed to the court in which the final judgment was rendered, and by whose process it must be executed, and in which the record remains, although such court may not be the highest court of the State, and although such highest court may have exercised a revisory jurisdiction over points in the case, and certified its decision to the court below. The omission in the record of these points, and the action in the highest court upon them, make no ground for *certiorari* on account of diminution.
3. Circumstances under which the inability of leading counsel to prepare for argument, within a time previously fixed by the court, and the sickness of his associate, do not make a sufficient ground for continuance of a cause.
4. Where the counsel of a plaintiff in error withdraw their appearance, the defendant in error, under the 16th rule, has the right either to have the plaintiff called and the suit dismissed, or to open the record and pray an affirmance.

A STATUTE of Massachusetts makes it an indictable offence, punishable with heavy fine and imprisonment, to keep any building for the sale of intoxicating liquors. Under this

statute, and for a violation of it, a certain McGuire was indicted, in January, 1864, at Salem, Massachusetts, in the *Superior* Court for the transaction of criminal business of Essex County, in that State. He set up as his defence a *license* from the Federal government, granted to him under the Internal Revenue Act, of July 1, 1863, which license was, in terms, "to carry on the business or occupation of a wholesale dealer in liquors," at the place for carrying it on at which he had been indicted.

The record of the said *Superior* Court certified that these acts of sale and keeping alleged were admitted to have been illegal and in violation of the law of Massachusetts, unless the defendant was authorized to keep and sell intoxicating liquors by the license granted to him conformably to the provision of the act of Congress, which license he produced in evidence, the same being set out in the record; that the court ruled that this license gave the defendant no right to sell intoxicating liquors in violation of the laws of Massachusetts; that the jury found a verdict of guilty; and that the defendant excepted; that the case, on the exceptions, was continued for the judgment of the *Supreme* Judicial Court for the commonwealth, and that the exceptions were "overruled by the Supreme Judicial Court, as by *the rescript on file.*" Judgment passed accordingly against McGuire, and a writ of error issued from this court to the *Superior* Court of Massachusetts.

The case excited considerable interest in Massachusetts, and the excitement was increasing. Vast numbers of persons had taken out and paid for licenses under the Federal government, and all of them were indicted by the State; the singular spectacle having been presented, it was said, of several people being arrested and put in jail, by the State, in the morning, for selling liquor *under* a Federal license; while in the afternoon an equal number of other persons were arrested and sent to the same jail, on behalf of the United States, for attempting to sell it *without* one.

At the last term a motion to advance the case upon the docket was made by Mr. Cushing, the counsel for the plain-

tiff in error (McGuire). It was then denied, because the attorney-general declined to state that the case was one in which the interests of the public revenue were concerned; because the attorney-general of Massachusetts, though consenting to an early hearing, did not ask for it; and because, in the opinion of the court, the importance of the result to the plaintiff in error was not sufficient to warrant the preference asked for over suitors having prior cases on the docket.

At this term another motion was made to advance the case. This motion was made by the attorney-general of Massachusetts, with whom the attorney-general of the United States joined. Both united in representing that the litigation growing out of the question presented by the record had so increased, and had assumed such a character, that the public interests, both of Massachusetts and of the United States, required an early hearing and decision of it.

This motion was now opposed by *Messrs. Cushing and Richardson, counsel for the plaintiff in error;* but having been fully considered by the court, it was allowed, and an order was made on the 13th of January, by which the cause was assigned for hearing on the following 20th; or, at the option of the counsel, immediately after the close of the arguments in the cause then being heard.

After this order was made, the plaintiff in error, by his counsel, submitted three motions.

First. That in case it should appear to the court, on inspection of the record, that the cause ought not to be dismissed for want of jurisdiction, a *certiorari* should be issued from this court to the *Supreme* Judicial Court of Massachusetts, or else to the *Superior* Court, to bring up the whole of the record; the ground of this motion being, that the judgment of the Supreme Court constituting, apparently (as was said), the decision of the highest court of law or equity in the State in which a decision could be had, was not set forth in the record as returned, but was merely referred to as remaining "on file" in the Superior Court.

Second. For leave to discontinue the writ of error, and

that the same be dismissed with costs to the State of Massachusetts; the ground for this being, that the counsel making the motion could not prepare and argue the case within the time prescribed in the order of the 13th instant; and that Mr. Gillet, his associate, was disabled by sickness.

Third. For leave that all the counsel might withdraw their appearances in the suit, and the plaintiff in error be called, in conformity with Rule No. 16, prescribing that "where there is no appearance for the plaintiff when the case is called for trial, the defendant may have the plaintiff called and dismiss the writ of error, or pray for an affirmance."

Messrs. Cushing and Richardson, in favor of the motion; Mr. Speed, A. G., and Mr. Reed, A. G. of Massachusetts, contra.

The CHIEF JUSTICE delivered the opinion of the court.

I. The first motion now made is, that in case the court shall be satisfied that it has jurisdiction of the case in the record, a writ of *certiorari* be sent to the Superior Court of Massachusetts, or to the Supreme Judicial Court of Massachusetts, to bring up the complete record; it being suggested that the record before us does not show the rescript of the latter court, supposed to contain its judgment in the case, sent down for execution to the former court.

It is quite clear that the record contains a case within the 25th section of the Judiciary Act of 1789, and, therefore, a case of which this court has jurisdiction. The plaintiff in error was indicted in the State court for selling intoxicating liquors contrary to the statutes of Massachusetts. He set up as a defence that he had received a license from the United States, which, under the true construction of the internal revenue act, authorized him to carry on the business of a wholesale dealer in liquors, and, therefore, had a right to sell liquor as charged, notwithstanding the statutes of Massachusetts to the contrary. The decision of the court was against the right claimed under the internal revenue act, and this made the precise case of which the Judiciary

Act gives jurisdiction to this court. The cause, therefore, cannot be dismissed for want of jurisdiction.

Nor do we perceive sufficient reason for awarding a writ of *certiorari* to bring up a more perfect record. It appears from the record before us that after verdict, and before judgment in the Superior Court, certain exceptions were sent up to the Supreme Judicial Court for its opinion, and that a rescript was subsequently sent down, overruling them, whereupon final judgment was entered upon the verdict. This, we understand, was according to the law and practice in Massachusetts, and the effect was to leave the entire record in the Superior Court.

If this were a case where the Supreme Judicial Court had rendered the final judgment, and had sent the judgment to the Superior Court for execution, and, with the judgment, the record, the direction of the writ of error of this court to the latter court would have been proper. This was settled in the case of *Gelston* v. *Hoyt*,* with which we are entirely satisfied.

But it is not necessary now to invoke the authority of that case. The judgment was not rendered in the Supreme Judicial Court, but in the Superior Court. That judgment was the final decision of the cause in which it was rendered, according to the true sense of the Judiciary Act, and the Superior Court was the highest court of the State in which a decision of the suit could be had, and, therefore, the only court to which the writ of error for this court could have been addressed.

We are not concerned here with the rulings of the Supreme Judicial Court upon the exceptions certified to it. The record shows clearly and fully the whole case upon which we are to pass, and the omission to set forth in it those exceptions and the rulings before them is no deficiency which needs to be supplied by *certiorari*.

The first motion must, therefore, be overruled.

II. The second motion is for leave to discontinue the writ of error at the cost of the plaintiff in error.

* 3 Wheaton, 246.

It is not the practice of this court to allow a discontinuance to any case, except for sufficient reason assigned, or by consent of the adverse party. In the case before us the attorney-general of Massachusetts resists the motion. The only reasons assigned in support of it are the alleged inability of the leading counsel for the plaintiff in error to make proper preparation for argument within the time allowed, and the sickness of one of his associate counsel. Our opinion of the learning and ability of the counsel who submits the motion obliges us to think that he has underrated his power and overrated his need of preparation to set before us the case of his client in all the strength of which it is capable, notwithstanding the absence of his associate, whose indisposition to us, as to him, causes sincere regret.

The second motion, therefore, must be, also, overruled.

III. The third motion is for leave to withdraw the appearance of all the counsel, and to have the plaintiff called under the 16th rule.

It is usual in this court to grant leave to withdraw an appearance whenever asked, saving, however, all the rights of the adverse party. That leave will, therefore, be granted in this case. We cannot, however, require the calling of the plaintiff with a view to the dismissal of the writ of error. After the withdrawal of the appearance in the case before us it will be the right of the defendant in error, under the 16th rule, to have the plaintiff called and the suit dismissed, or to open the record and pray an affirmance.

Motions denied.

[See the next case.—Rep.]

McGuire v. The Commonwealth.

(merits.)

1. A license granted by the United States, under the Internal Revenue Act of July 1, 1862, to carry on the business of a wholesale liquor dealer, in a particular State named, does not, although it have been granted in

consideration of a fee paid, give the licensee power to carry on the business in violation of the State laws forbidding such business to be carried on within its limits.

2. The preceding case affirmed as to the point of jurisdiction; point No. 1 of the syllabus.

A STATUTE of Massachusetts* enacts, that "all buildings, places, or tenements, used for the illegal keeping or sale of intoxicating liquors, shall be deemed common nuisances," and makes the keeping of such nuisance an offence punishable with fine and imprisonment. McGuire kept and maintained such a tenement at No. 6 Derby Square, Salem, Essex County, Massachusetts, and was indicted, in one of the courts of Massachusetts, accordingly.

His defence was a license granted to him under the Internal Revenue Act of the United States, approved July 1, 1862.† That act provides that no person shall be engaged in, prosecute, or carry on the business of a wholesale dealer in liquor, "until he shall have obtained a license;" and that such wholesale dealer shall for his license pay $100. A proviso to its 67th section, declares that "*no such license shall be construed to authorize* the commencement or continuation of any trade, business, occupation or employment therein mentioned, within any State or Territory of the United States, in which it is or shall be *specially prohibited by the laws thereof, or in violation of the laws of any State or Territory.*"

Mr. McGuire's license thus ran:

"TO ALL WHOM IT MAY CONCERN:

"This license is granted to McGuire & Co., of the city of Salem, in the County of Essex and State of Massachusetts, to carry on the business or occupation of wholesale dealer in liquors, at No. 6, Derby Square, in the aforementioned city, county, and State, *having paid the tax of one hundred dollars therefor*, conformably to the provisions of an act entitled 'An act to provide internal revenue to support the government, and to pay interest on the public debt,' approved July 1, 1862.

* General Statutes, ch. 87.

† 12 Stat. at Large, 459.

"This license to be in force until the first day of September, 1863, provided the said McGuire shall conform to the requirements of said act, and of such other act or acts as are now or may hereafter be in this behalf enacted.

"Given under my hand and seal, at Salem, this first day of September, A.D. 1862.

"[SEAL.] VINCENT BROWNE,

"Collector, Fifth Collection District, State of Massachusetts."

McGuire was found and adjudged guilty, and the case having been taken to the Superior Court of the State of Massachusetts, and the judgment below affirmed, the case was now here under the well-known 25th section of the Judiciary Act, authorizing re-examination of a final judgment in the highest court of a State, in which is drawn in question the validity of an authority exercised under the United States, the decision being against the validity.

Messrs. Cushing and Richardson, for McGuire, plaintiff in error.

I. The attempt of the State of Massachusetts to punish McGuire for doing that which the license of the Federal government expressly empowered him to do, was a nullification of an act of Congress, and a violation of the paramount authority of the United States.

The license is not a mere tax, but an authority, sold by the United States, and purchased by the licensee for a sum of money in virtue of which the United States contract with the licensee that he shall have power to do the thing licensed; without which, the license and the money received for it are an act of imposture, fraud, and robbery of its citizens by the Federal government.

It is worth while to examine a little the meaning, in law, of this term "license."

In the common law the word is of early, constant, and well-defined use, as applied to the concession of certain rights by the owners of land to a third party.* In this rela-

* Brooke's Abridgment, tit. "License;" and for an exhibition of learning on the subject see the case of Thomas v. Sorrell, Vaughan, 330; also, Wood v. Leadbitter, 13 Meeson & Welsby, 843.

tion, the license imparts to the licensee rights, resembling, though not identical with an easement; as, for example, the right to hunt on another man's estate, to cut wood, to fish, or to enjoy participation in a water-course. The licensee possesses property of the class denominated incorporeal hereditaments, and constituting property as rightful as the corporeal hereditament. When such a license is coupled with an interest, by reason of the payment of price, the authority conferred is not a mere permission, but it amounts to a grant, which obliges the grantor, and vests legal property in the grantee.*

II. The only ground on which our rights under the license can be denied is the *proviso* of the 67th section.

Now this clause constitutes a separate provision, of the class of enactments called "saving clauses;" and if it be allowed to have effect, destroys, abrogates, and abolishes whatever there may be of thought, virtue, or use, in the general purview, intendment, and scope of the act. It presents a case of congenital suicide. In such a case, the rule of law is positive, that the saving clause, not the enactment, must be rejected. An illustration is to be found in *Alton Wood's Case*,† where Lord Coke puts it thus: "J. S. is tenant in fee simple of the manor of Dale, or tenant in tail thereof, the reversion to the king; and afterwards this manor is, by express name, given by act of Parliament to the king, saving the right, title, interest, &c., of all person and persons. Whether the estate of J. S. be saved or no? And it seems not; for the saving as to the owner of the land is repugnant, inasmuch as the manor is by express name given to the king; for if the general saving shall extend to the owner of the land, then the act would be made in vain." So in Plowden,‡ the supposed attainder of the Duke of Norfolk was, by act of Parliament, 1 *Mariæ*, "declared to be void and

* Webb v. Puter Noster, Palmer, 71; Winter v. Brockwell, 8 East, 308; Liggins v. Inge, 7 Bingham, 682; Rerick v. Kern, 14 Sergeant & Rawle, 267; Wood v. Manly, 11 Adolphus & Ellis, 34.

† 1 Reports, 47 a.

‡ Walsingham's Case, page 564; cited by Coke, as above.

null *ab initio*, saving the estates and leases made by Edward VI." That saving was held void; for when the attainder was declared to be void, the said saving was against the body of the act, and therefore void. And the like in other cases, where the saving clause is repugnant to the gift or grant, and if allowed to operate, would render it vain and nugatory. We have the rule recognized as far back as the days of the reporter Keilwey,* who speaks of such a proviso as "voide per cause del *contrariositie*." In the quaint phraseology of the old reporters, such a clause is denominated "a flattering one," and is said by Plowden to be "such as serves to make fools merry;" implying that all persons who, like the defendant in error in this case, rely upon such a saving clause in contradiction to the whole purview of the statute, are flattered with false hopes, and if they become merry in the supposition that such a saving clause does them any good, are merry not according to wisdom.†

It is quite common, in the construction of statutes, to find a subsequent clause, although apparently general in terms, restrained by a preceding clause of paramount exigency and authority.‡

III. The Constitution declares that "all duties, imposts, and excises shall be *uniform* throughout the United States." Shall Massachusetts, because of peculiar *notions* of public policy of her own, evade and escape her due share of the burden of Federal taxation, and throw the same on the States of Maine, New York, Pennsylvania, Georgia, Ohio, Illinois, Iowa, and California? If Massachusetts may do this, cannot the other New England States, which partake more or less of the same peculiar notions, throw off their taxes upon the shoulders of the other States of the Union? If New England may do this, can it not also be done by all the eleven States late in rebellion against the public author-

* Keilwey, 174, b; see, also, of a later date, Thornby *v.* Fleetwood, 10 Modern, 115, 408.

† Walsingham's Case, Plowden, 565; Case of the Proxies, Sir John Davies, 2.

‡ Roper *v.* Ratcliffe, 10 Modern, 242, 485.

ity of the Union? Nay, if six States, or even one State, may do this, cannot every and all the States do it, so as completely to nullify the tax provisions of the act of Congress, and so exhibit to the world the ridiculous and contemptible spectacle of an act of Congress, to raise revenue for the support of government and payment of the public debt of the United States, containing within itself a provision for its own utter nullification by the people of each and all of the States?

We suppose that never before in the history of the government did Congress undertake to enact that any one of the States might, at pleasure, exempt itself from the purview of a general act of Congress, laying "duties, imposts, and excises," on the whole United States, and so take away from those taxes the uniformity required by the Constitution. Hence, it cannot be expected that we shall be able to cite any adjudged case to the effect that all such taxes shall be uniform. No legislator imagined it could be otherwise; no law was passed on which the question could be raised; no court or judge could decide or even debate the point. The converse of this question, to be sure, has been raised politically, but never judicially, so far as regards this court, in the great political discussion of the right assumed by the State of South Carolina to exempt herself from the purview of certain duties on imports, imposed by act of Congress on the whole United States. That, however, was professedly nullification of an act of Congress. The violation of the rule is not improved in quality by transferring the venue to Massachusetts.

The laws of Massachusetts set up here are in violation of the tax power of the United States. It was long ago determined that this power is complete, exclusive, paramount. The time is passed when this doctrine can be disputed. It has been definitively determined by this court.* But these laws declare to be outlawed, and seize and destroy as such, distilled spirits, fermented liquors, and wines, whether for-

* The Bank-Tax Case, 2 Wallace, 200.

eign or domestic, subject to the excise laws of the United States as well as its foreign import duties, and so, in effect, extinguish together the taxed article and the tax-power of the United States.

They violate that provision of the Constitution, which declares that, "no State shall make any law impairing the obligation of contracts;" for they deprive the articles of trade in question of all the qualities of property; which extinguishes the subject-matter of contracts, and the contracts themselves, therewith.

IV. The "liquor laws" of Massachusetts have nothing in them of morality, expediency, or of public interest, that should override a license with interest, granted on valuable consideration by the Federal government.

1. It is not true, as alleged, that wines, fermented liquors, or even distilled spirits, are poisons of themselves, otherwise than that everything we eat or drink may be deleterious if used in excess.

2. In view of the example and injunctions of our Saviour and his Apostles, in this respect, it cannot be true that the use of wine is immoral of itself.

3. It is not true, as pretended, that it is our duty to abstain utterly from any object of health or enjoyment because others may abuse it. The effect of this doctrine would be to deprive us of everything desirable, even the dearest of all human relations; since nothing exists for the use of man which some men will not abuse.

4. It avails nothing to make war on the *sale* of distilled spirits; for spirits may be distilled in every man's kitchen, by means as cheap, as accessible, and as manageable as the preparation of a cup of tea or coffee; and if it were not so, other anæsthetic agents exist, which the law cannot reach, such as opium and bang, the familiar means of intoxication used by more than half of the human race, to say nothing of the professed anæsthetic medicaments.

5. The universal prevalence of the use of one or another object of this nature, in all ages, all countries, and all states of society, serves to show that they satisfy a physical exi-

gency of man's organization as imperative as that of food, and of course laws cannot eradicate, although they may regulate, such use.

6. It shocks the sense of mankind, to prohibit absolutely by law the use of wines, fermented liquors, and distilled spirits as a healthful beverage in moderation of use; and the effect of such laws, if rigidly enforced, would only be to introduce by the side of the vice of drunkenness, the worse one of universal hypocrisy.

7. It confounds all distinction of right and wrong, in the acts of instructed men, and in the conscience of the less instructed, to seek to elevate the use of wine to the dignity of an illegal and immoral thing, for the suppression of which all the energies of society should be tempestuously exerted.

The legislation of Massachusetts and Maine is nothing new. It is the exploded folly of England revived. It dates in our ancestral home as far back at least as the period of the Protestant Reformation and the reign of Edward VI. The overthrow of the Catholic Church, and of the moral and religious influence of the regular and secular clergy of that church, compelled legislators to look around for some other means of preventing the excesses of men. They could think of nothing but penal laws. And from that day to this has been kept up the delusion, with more or less hold on society, that penal laws are capable of counteracting immoral tendencies and producing moral conduct.

It needs only to examine the statutes on this subject collected in Hawkins's Pleas of the Crown, c. 78, and Burns's Justice of the Peace, title "Ale Houses," to observe the efforts to substitute in this way penal legislation for moral and religious instruction.

The laws enacted in England, from the time of Edward VI down to that of the Georges, and in the several States of the Union, as exemplified in their worst form by the existing laws of Maine and Massachusetts, demonstrate how wildly, from that day to this, our English and American society has been floundering along from one folly to another in the paths of false theory and unphilosophical legislation, under

the influence of the idea that *statute law* is the all-sufficient remedy of every sort of human infirmity; an idea which is itself the special human infirmity of the well-intentioned people of New England.

The so-called temperance agitation has effected no abatement, in the whole, of the use or abuse of intoxicating drinks, and in the end will probably produce, by recoil, a state of things worse than that which existed before the agitation. No superiority then over the nation is due to those legislators of Massachusetts, who pretend to be "more powerful than Nature, wiser than Truth, better than God."

Mr. Speed, A. G. U. S., and Mr. Reed, A. G. of Massachusetts, contra.

Mr. Justice NELSON delivered the opinion of the court.

The court below decided that the license received under the act of Congress gave to the defendant no right to keep or sell intoxicating liquors in violation of the State law.

Whatever might be the effect of this license as to the rights under it, in the absence of other provisions of the act of Congress—a question not involved in the case, and, therefore, not material to be noticed—it is quite clear that it conferred no right or authority on the defendant below, and hence furnished no defence to the indictment under the law of the State.

The 67th section of the act of Congress enacts, "that no license hereinbefore provided for, if granted, shall be construed to authorize the commencement or continuation of any trade, business, occupation, or employment therein mentioned, within any State or Territory of the United States in which it is or shall be specially prohibited by the laws thereof, or in violation of the laws of any State or Territory."

In view of this provision, it is in vain to attempt to give force or effect to the license against the State law; and hence the authority derived from it, upon which the defendant relied for his defence in the court below, fails.

The decision was against an authority set up under an act of Congress, and the case is, therefore, rightfully here under

the 25th section of the Judiciary Act. But as we are of opinion the decision of the court below was right, the judgment must be affirmed.

JUDGMENT AFFIRMED.

[See the preceding case.—REP.]

COMSTOCK v. CRAWFORD.

1. The recital in the record of proceeding of a Probate Court, under a statute of Wisconsin Territory, of facts necessary to give such court jurisdiction, is *primâ facie* evidence of the facts recited.
2. The jurisdiction existing, the subsequent action of the court is the exercise of its judicial authority, and can only be questioned on appeal; the mode provided by the law of the Territory for review of the determinations of the court.

   Where a statute of the Territory provided that the real estate of the decedent might be sold to satisfy his just debts when the personalty was insufficient, and authorized the Probate Court of the county where the deceased last dwelt, or in which the real estate was situated, to license the administrator to make the sale upon representation of this insufficiency, and "on the same being made to appear" to the court, and required the court, previously to passing upon the representation, to order notice to be given to all parties concerned, or their guardians, who did not signify their assent to the sale, to show cause why the license should not be granted.

   Held, that the representation of the insufficiency of the personal property of the deceased to pay his just debts was the only act required to call into exercise the power of the court. The necessity and propriety of the sale solicited, were matters to be considered at the hearing upon the order to show cause. A license following such hearing involved an adjudication upon these points, and such adjudication was conclusive.
3. Where an administrator had been appointed, and after giving the required bonds informed the court that he was unable to act, and resigned the appointment, not having taken possession of the property of the intestate, or attempted to exercise any control over it, it was competent for the court to accept the resignation, and to appoint a new administrator. The power to accept the resignation and to make the second appointment, under these circumstances, were incidents of the power to make the first.
4. A second license to an administrator to sell property already sold by him,

Statement of the case.

and a second purchase of it by the same party who had already bought it before, is not evidence of fraud in the first sale.

5. The title of a purchaser at an administrator's sale is not affected by the fact that the proceeds of the sale exceeded the amount of the alleged debts of the decedent, for the payment of which such sale was ordered.

A STATUTE of Wisconsin Territory ordained that there should be appointed by the Governor, in and for each county, a person to be known as "the public administrator" thereof; and when any person shall die intestate, leaving personal property within the Territory, but leaving no widow, next of kin, or creditor living therein, "administration"—the statute went on to say—"*shall* be granted" to the "public administrator" of the county in which the intestate died, or, if the decedent have been a non-resident, of the county in which the estate may be found. The statute further ordained, that when administration shall have been granted to any public administrator, and it shall afterwards appear that there is a widow, next of kin, &c., the judge of probate shall—on application to do so made within six months after such grant—revoke the letters granted to the public administrator and grant them to such widow, next of kin, &c., according to law.

In force in the same Territory, along with this statute, was another, distinct and independent of it, providing, much as others do in different States, for the sale, under order of the county Probate Court, of the real estate of decedents, to pay debts when personalty left is insufficient to do so. It enacted that when the personalty should not be sufficient for this purpose, "upon representation, and the same being made to appear to the District or Probate Court of the county where the deceased person last dwelt, or in the county in which the real estate lies," the said court might license the administrator to make sale of all or any part of the realty, "*so far* as shall be necessary to satisfy the just debts." "The said court," the act proceeded to say, "previous to passing on any petition or representation for the sale, shall order due notice to be given to all parties concerned, or their guardians, who do not signify their assent to such sale, to show cause,

at a time and place appointed, why such license shall not be granted."

With these acts in force in *Wisconsin*, and owning personalty in Iowa County and realty in Grant County, *of that Territory*, one Comstock died in *Illinois*, having been, before and at his death, domiciled *there*. His brother was appointed, soon after, administrator, by the Probate Court of Iowa County, in Wisconsin; but he never took possession of the property of the estate, nor attempted to exercise ownership over it; and in a short time after his appointment sent word to the probate judge that he was unable to attend to the duties of the administration, and requested that officer to appoint another kinsman of the decedent, one Ripley, of Illinois, to the place. A formal resignation sent afterwards was accepted, and Ripley appointed; *nothing, however, in all the matter of the estate, appearing about the "public administrator."*

A few years afterwards, Ripley, acting under the letters granted to him in Wisconsin, applied to the Probate Court of Grant County, in that Territory, for license to sell "*so much*" of the real estate of the deceased in the county as would "enable him to pay the sum of $8000," together with the costs and charges attending the sale.

The record of the proceeding—and this is material—stated the fact that written application for the sale had been made. It set forth the application at length, representing that the personal property of the deceased was insufficient to pay his just debts by the sum of about $8000. It gave the order directing publication of notice of the application; it recited that due notice had been given; it contained (by way only, however, of incorporation or interposition in it) a certificate of a probate justice of Illinois (in which State it appeared that administration of Comstock's effects had also been had), that the personal property of the deceased had been exhausted in payment of his debts, and that there remained debts unpaid to the amount named. "And it *being made to appear*," the record went on to say, "that it is *necessary and proper* that the said administrator should be licensed" to

make sale of the real estate, *or so much* as will enable him to pay the sum of $8000, "*due proof of the existence and amount of said debts being made*" to the court, and no person appearing to make objection, the court adjudged and decreed that "the said administrator be licensed, authorized, and empowered to sell *so much*, &c., as may enable him to pay the sum of $8000, the *debts due and owing from said estate*, together with the costs and charges attending the sale," &c.

Ripley made the sale, the purchaser being a certain Crawford, defendant here and below; and he having received the administrator's deed and entered into possession, the heirs of Comstock now brought ejectment against him in the Circuit Court of Wisconsin, to get back the land. On the trial the defendant produced and gave in evidence, under objection, the record of the Probate Court of Iowa County, containing the letters of administration, resignation, &c., and also the record of the Probate Court of Grant County, above stated, and closed.

After the defendant had thus closed, the plaintiff, for the *purpose of proving collusion and fraud* between the administrator and the purchaser, offered the record of a license to the administrator to sell the *same* premises, subsequent in date to the one above mentioned. The plaintiff offered, also, to prove that the administrator had made sales to the extent of $10,000, while his license to sell was to the extent of but $8000. But both offers were refused by the court.

The admission of the letters, resignation, and records of the Probate Court, and these two refusals, were the matters considered on writ of error here. The record did *not* show, however, that the representation, which was the preliminary step in the proceeding for the sale, gave the amount and description of the personal property of the deceased, or a statement of the just debts which he owed. Neither, independently of the certificate of the probate judge of Illinois, did the order for the sale show—otherwise than as was to be inferred from the recital, just above quoted, of its being "made to appear that it was *necessary and proper* that the said administrator should be licensed to make sale of the

real estate"—that the personal property of the estate was insufficient to pay the debts.

The defendant had judgment, and the plaintiffs brought the case here on error.

Messrs. Buttrick, Hill, and J. S. Brown, for the heirs, plaintiffs in error.

I. The appointment of a general administrator for the estate of a non-resident intestate, was extra-judicial and void under the statute. The administration belonged to "the public administrator" by its imperative terms. The appointment of that officer was not given to the court. The governor was to make it, and of course had made it. The public administrator—*executor a lege constitutus*—like an *executor a testatore constitutus*, was ever present, ready to receive the administration, to perform his duties prescribed by law, to execute and carry out the process, the orders, decrees, and sentences of his court. Yet he is never heard of in the case, no more than if neither he nor the case had ever existed. *Griffith* v. *Frazier*,* in this court, temp. Marshall, is in point. The syllabus of the case is thus given by Cranch:

"So long as a qualified executor is capable of exercising the authority with which he is invested by the testator, that authority cannot be conferred either with or without limitation by the court of ordinary or any other person. And if during such capability of the executor the ordinary grant administration either absolute or temporary to another person, that grant is absolutely void."

II. If the appointment of the first administrator was valid, the appointment of the second was void. Unless enabled by statute, administrators cannot resign. This is the law of Wisconsin as held in *Sitzman* v. *Paquette*.†

III. The record of the Probate Court of Grant County does not support the license to sell.

* 8 Cranch, 9; and see Warner v. People, 2 Denio, 272; People v. White, 24 Wendell, 539–541; 1 J. J. Marshall, 205, 206; Reynolds v. Orvis, 7 Cowen, 269.

† 18 Wisconsin, 293.

1. The representation to the court does not give the amount and description of the goods and chattels of the deceased, nor a statement of the *just debts which he owed.* These were essential facts which were to be shown to the court before it could act.

2. The order for the sale does not show the insufficiency of the personal property. This is the main point in our case. The order shows that Ripley filed a certificate, and that it appeared to the court that it was necessary and proper that a license should issue, and that due proof of the existence and the amount of the debt was made, but the all-important fact *that the goods and chattels belonging to the estate were insufficient to pay them* nowhere appears, unless we resort to the contents of the certificate of the probate justice of *Illinois.* Obviously, there was nothing but this before the court relative to debts, personalty, or anything else. The Probate Court of *Wisconsin* avoids the responsibility of declaring that *it* had evidence or was satisfied that the debt exceeded the personalty. The record of this Wisconsin court interposits in an anomalous way—a way which shows that *it* knew nothing on the subject—a certificate from a person in another State. Certainly under the statute this can make no foundation for the license, or for the order preliminary thereto.

Had the Probate Court of *Grant County* inquired into and determined the existence of the fact, then the defendant in error might perhaps claim immunity under *Grignon's Lessee* v. *Astor.** But this case has no application. There the record was perfect and complete. In the language of the court it was absolute verity. There an adjudication had been made, the necessity of the sale established, and to meet it specific real property was designated. The judgment was *in rem* and of itself operated to divest the title of the heirs; after decree it remained for the ministerial officer to perform it.

If it be argued that because the fact is *recited* in the license, it is conclusive, our answer is that *Sibly* v. *Waffle,*† in the

* 2 Howard, 319.

† 16 New York, 180.

New York Court of Appeals, is in point to the contrary. In that case "an order of sale *recited* that it was made upon proof of due publication of the order to show cause." But what says the syllabus? "Such *recital* is no more than a statement by the surrogate that he had acquired jurisdiction, and is of no effect; not showing an adjudication that he found from the evidence, the *facts* upon which his jurisdiction depended."

IV. There was a distinct offer on the part of the plaintiff to show collusion and fraud between Ripley and the defendant. The second license *tended* to do so. Its effect was for the jury, and it ought to have been received.

V. But at best the power to sell was but for $8000, and we have an actual sale for $10,000. It might as well have been for $15,000 or for $20,000. This business of selling the real estate of infant children—the best and often the only dependence they have—is a matter which invites to carelessness and fraud, and which, unless narrowly watched, involves in ruin a class who, from their tender years, claim peculiar care from courts of justice. The order should surely have been interpreted with strictness. "That no individual or public officer can sell and convey a good title to the land of another, is one of those self-evident propositions," says Marshall, C. J.,* "to which the mind assents without hesitation, and that the person invested with such a power must pursue with precision the course prescribed by law or his act is invalid, is a principle which has been repeatedly recognized by the court." This declaration of judicial wisdom from as great a magistrate as ever sat in judgment, applies to much of this case. It applies specially to the mode in which the order to sell was executed.

Mr. Laken, contra, for the purchaser.

Mr. Justice FIELD delivered the opinion of the court.

It is only necessary to examine the objections taken to the appointment of the first administrator, and the subse-

* Thatcher v. Powell, 6 Wheaton, 125.

quent acceptance of his resignation, so far as they affect the jurisdiction of the Probate Court. It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority.

By the statute of Wisconsin, under which the administrator was appointed, the only facts necessary to give the Probate Court jurisdiction were the death of the non-resident intestate and the possession by him, at the time, of personal property within the Territory. Both of these facts are recited in the record of the proceedings produced by the defendant, which sets forth the letters of administration at large. These recitals are *primâ facie* evidence of the facts recited.* They show the jurisdiction of the court over the subject. What followed was done in the exercise of its judicial authority, and could only be questioned on appeal, the mode provided by the law of the Territory for review of the determinations of the court. Whether there was a widow of the deceased, or any next of kin, or creditor, who was a proper person to receive letters, if he had applied for them, or whether there was any public administrator in office authorized or fit to take charge of the estate, or to which of these several parties it was meet that the administration should be intrusted, were matters for the consideration and determination of the court; and its action respecting them, however irregular, cannot be impeached collaterally.

The same observations are applicable to the acceptance of the resignation of the first administrator, and the appointment of Ripley in his place. If the second appointment was irregularly made, the irregularity should have been corrected on appeal.

* Barber v. Winslow, 12 Wendell, 102; Porter v. Merchants' Bank, 28 New York, 641.

But, independent of this consideration, there is nothing in the objection. The power to accept the resignation and make the second appointment, under the circumstances of this case, were necessary incidents of the power to grant letters of administration in the first instance. It does not appear that the first administrator ever took possession of the property of the intestate, or attempted to exercise any control over it; and his inability to act left the estate in fact without any administrator. The duty of the court therefore to provide for its proper administration could not otherwise have been discharged than by a new appointment.

But the principal reliance of the plaintiffs is placed upon the objections taken to the action of the Probate Court of Grant County in ordering the sale. With reference to these objections, as with reference to the objections taken to the original appointment of the administrator, it is only necessary to consider them so far as they affect the jurisdiction of the court.

The proceeding for the sale of the real property of an intestate, though had in the general course of administration, is a distinct and independent proceeding authorized by statute only in certain specially-designated cases. But when by the presentation of a case within the statute the jurisdiction of the court has once attached, the regularity or irregularity of subsequent steps can only be questioned in some direct mode prescribed by law. They are not matters for which the decrees of the court can be collaterally assailed.

The statute of the Territory provided that the real estate of a decedent might be sold to satisfy the just debts which he owed, when the personal property of the estate was insufficient to pay the same. And it authorized the Probate Court of the county where the deceased last dwelt, or in which the real estate was situated, to license the administrator to make the sale upon representation of this insufficiency, and "the same being made to appear" to the court. It also required the court, previous to passing upon the representation, to order notice to be given to all parties concerned, or their guardians, who did not signify their assent

to the sale, to show cause why the license should not be granted.

As thus seen, the representation of the insufficiency of the personal property of the deceased to pay his just debts, was the only act required to call into exercise the power of the court. The truth of the representation was a matter for subsequent inquiry. How this should be made to appear the statute did not designate, but from the notice required of the hearing upon the representation, it is clear that the necessity and propriety of the sale solicited were matters to be then considered. A license following such hearing necessarily involved an adjudication upon these points. The jurisdiction to hear was conferred by the representation; the authority to license followed from the fact which the court was required to ascertain and settle by its decision. In such case the decision of the court is conclusive.*

The record of the Probate Court, produced by the defendant, states the fact that a written application for the sale was made. It sets forth the application at length, representing that the personal property of the deceased was insufficient to pay his just debts by the sum of about eight thousand dollars; it gives the order directing publication of notice of the application; it recites that due notice was given; it contains a certificate of the probate justice of Illinois that the personal property of the deceased had been exhausted in payment of his debts, and that there remained debts unpaid to the amount named, and it states, by way of further recital, that it had been made to appear to the court that the sale was necessary and proper to pay such debts of the existence and amount of which due proof had been given.

To this record it is further objected: 1st. That the representation, which was the preliminary step in the proceeding for the sale, did not give the amount and description of the personal property of the deceased, or a statement of the just

* Van Steenbergh v. Bigelow, 8 Wendell, 42; Jackson v. Robinson, 4 Id. 437; Jackson v. Crawford, 12 Id. 534; Atkins v. Kinnan, 20 Id. 242, Porter v. Purdy, 29 New York, 106; Betts v. Bagley, 12 Pickering, 572.

debts which he owed; and 2d. That the order for the sale did not show that the personal property of the estate was insufficient to pay the debts, unless resort was had to the certificate of the probate justice of Illinois.

The answer to the first objection is found in the fact that the statute did not require any such particularity of statement with reference to the property of the deceased, or to the debts which he owed. It only required a representation of the general fact. The particularity desired to guide the court was to be obtained at the hearing of the application.

The answer to the second objection is, that the sufficiency of the proof upon which the court took its action is not a matter open to consideration in a collateral manner. It does not touch the question of jurisdiction.

Similar questions were presented for the consideration of this court, in *Grignon's Lessee* v. *Astor*.* That case turned upon the validity of proceedings for the sale of real property of an intestate under a statute almost identical in its provisions with the one under which the sale in the present case was made. And it was there held that the representation was sufficient to bring the power of the court into action; that it was enough that there was something of record which showed the subject before the court, and that the granting of the license was an adjudication upon all the facts necessary to give jurisdiction. That decision disposes of the particular objections stated to the sale in this case.

The record of the subsequent license to the administrator to sell the same property, and its second purchase by the defendant, was properly excluded. It did not show, or tend to show, fraud in the first sale or any collusion between the administrator and the purchaser. The proceeding may have originated in a desire to remove doubts suggested as to the regularity of the original sale, but whether this was so or not, the first sale not being set aside, its validity could not be impaired by the second.

There is no force in the objection that the proceeds of

* 2 Howard, 319; see also Florentine v. Barton, 2 Wallace, 210.

sales made by the administrator of lands of the intestate amounted to over ten thousand dollars instead of eight thousand, the amount of his alleged debts remaining unpaid. The title of the purchaser could not be affected by the excess. That was a matter solely for the consideration of the court on the return of the sales by the administrator.

JUDGMENT AFFIRMED.

UNITED STATES v. HOLLIDAY.

SAME v. HAAS.

1. The 12th section of the Judiciary Act of 1789, which gives to the Circuit Courts concurrent jurisdiction of all crimes and offences cognizable in the District Courts, is prospective, and embraces all offences the jurisdiction of which is vested in the District Courts by subsequent statutes.
2. Therefore the Circuit Courts have jurisdiction of the offence of selling ardent spirits to an Indian, under the act of February 12, 1862, although by that act the jurisdiction is vested only in the District Court.
3. By that act Congress intended to make it penal to sell spirituous liquor to an Indian under charge of an Indian agent, although it was sold outside of any Indian reservation and within the limits of a State.
4. The act aforesaid is constitutional, and is based upon the power of Congress to regulate commerce with the Indian tribes.
5. This power extends to the regulation of commerce with the Indian tribes and with the individual members of such tribes, though the traffic and the Indian with whom it is carried on are wholly within the territorial limits of a State.
6. Whether any particular class of Indians are still to be regarded as a tribe, or have ceased to hold the tribal relation, is primarily a question for the political departments of the government, and if they have decided it, this court will follow their lead.
7. No State can by either its constitution or other legislation withdraw the Indians within its limits from the operation of the laws of Congress regulating trade with them; notwithstanding any rights it may confer on such Indians as electors or citizens.

THESE were indictments, independent of each other, for violations of the act of Congress of February 13, 1862,*

* 12 Stat. at Large, 339.

which declares that if any person shall sell any spirituous liquors "to any *Indian* under the charge of any Indian superintendent or Indian agent appointed by the United States, he shall, on conviction thereof before the proper *District* Court of the United States," be fined and imprisoned.

This act of 1862 was amendatory of an act of June 30, 1834,* declaring that if any person sold liquor to an Indian in *the Indian country* he should forfeit five hundred dollars.

These indictments were both in *District* Courts of the United States—the one against Haas in the District Court for Minnesota (there not being at the time of the indictment any *Circuit* Court as yet established in Minnesota), and that against Holliday in the District Court for Michigan,—and under the act of August 8, 1846,† authorizing the remission of indictments from the District to the Circuit Courts, they were both removed into the *Circuit* Courts; the case of Haas, after he had been convicted of the offence charged and while a motion in arrest of judgment was pending and undetermined in the *District* Court.

IN HAAS'S CASE,

The indictment charged that the defendant had sold the liquor to a Winnebago Indian, in the State of Minnesota, under the charge of an Indian agent of the United States; but it did not allege that the *locus in quo* was within the reservation belonging to *the Winnebago tribe, or within any Indian reservation, or within the Indian country.*

Upon this indictment the judges of the Circuit Court were divided in opinion on the questions:

1. Whether, under the act of February 13, 1862, the offence for which the defendant is indicted was one of which the *Circuit* Court could have original jurisdiction?

2. Whether, under the facts above stated, *any* court of the United States had jurisdiction of the offence?

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* 4 Stat. at Large, 782. † 9 Id. 73.

IN HOLLIDAY'S CASE,

The indictment charged the defendant with selling liquor, in Gratiot County, Michigan, to one Otibsko, an Indian under the charge of an Indian agent appointed by the United States.

The plea alleged that Gratiot County was *an organized county of the State of Michigan; that it was not within the Indian country; that no Indian reservation existed within it;* that Otibsko was one of the Chippewa Indians mentioned in certain treaties which were referred to; that Otibsko accepted lands in Michigan, and entered into possession of them under a certificate from the United States; that the tribal organization of the said Chippewa Indians was dissolved by one of the treaties, except in so far as it was necessary to preserve it for the purposes of the same; and that Otibsko had voted at elections for county and town officers.

The plea set forth also certain provisions of the constitution and laws of Michigan which confer political rights upon civilized male inhabitants of Indian descent, natives of the United States and not members of any tribes, and also judicial rights and privileges upon all Indians.

The government, by replication admitting the truth of the matters contained in the plea, alleged that, pursuant to the existing treaties with the said Chippewas, and the regulations and practice of the Interior Department and Indian Bureau, the chiefs and head men of the said Chippewas continued to be the representatives of the tribe; that the Indian agent for Michigan was required to deal with the said chiefs and head men of the said Chippewas as such, and to take the receipts of such chiefs and head men for money and property delivered to the said Chippewas under the provisions of the treaties.

And alleged further, that the said Otibsko recognized and acknowledged the chiefs and head men of the Chippewas of Saginaw, and resided with the said Indians on the lands in Isabella County, selected by them under the treaty of 1855; and that the Indian agent of the United States annually

distributed a sum of money and treaty property for the benefit of the said Otibsko.

On this state of facts the Circuit Court was divided on the following points:

1. Whether the act of Congress, of February, 1862, does by proper construction extend to a sale of liquor, such as is charged in the indictment, under the circumstances stated in the plea and replication?

2. Whether, if construed to so extend, Congress has the constitutional right to so enact?

3. Whether, under the circumstances stated in the plea and replication, the Indian named can be considered as under the charge of an Indian agent within the meaning of the act?

4. Whether, upon the facts stated in the plea and replication, the said Otibsko was a civilized Indian, not a member of any tribe within the meaning of the constitution of Michigan, and whether he was a citizen of the State of Michigan?

5. Whether the provisions of the constitution and laws of the State of Michigan, stated in the plea of the defendant, were, under all the facts and circumstances stated in said plea and replication, and, under the constitution, the said treaties and act of Congress of 1862, a bar to said indictment?

The record in this case showed that the Secretary of the Interior and the Commissioner of Indian Affairs had decided that it was necessary, in order to carry into effect the provisions of the treaty referred to and set up by Holliday, that the tribal organization should be preserved.

In both cases the questions were now, by certificate of division, here.

Mr. Romeyn, for Holliday; no counsel appearing for Haas: The cases in many features are alike. To some extent, the argument for one serves for both; though the first question certified in Haas's case does not arise in Holliday's.

As respects Holliday the question is, whether the United States can punish, as a criminal offence, the selling of liquor to an Indian who is connected with a tribal organization only so far as to receive his allowance from the United States,

through the chief or head man? who is a land-owner in his own individual right, and a tax-payer in one of the States of the Union; when the liquor was sold, not on an Indian reserve, but in an organized county of a State; a district as exclusively under the jurisdiction of the State as the city of New York is under the jurisdiction of the State of New York. If so, then if the liquor had been sold to this Indian at the Astor House in New York, the proprietors of that house would be liable, on the same principles, and to the same extent as this defendant.

I. On every principle, the act of 1862 is to receive a *strict* construction. It is a penal act. It is of doubtful constitutionality.

No violence is done to the *language* of the statute, by confining its operation to Indians under the charge of an agent *within the Indian country;* for it was the evident *policy* of the act to protect the Indian, *within the Indian country;* and in addition, that policy is sufficiently sustained by the construction that the *introduction* of liquors into the Indian country shall be illegal.

Suppose that a civilized, educated Indian, a citizen of another State, should accept a glass of wine at a military post; would that be an offence under this act? We should think not.

II. If the act of 1862 be so construed as to embrace this charge, under the admitted facts of the case, then its enactments are beyond the powers of Congress, in conflict with the rights of the State, and are so far void.

As the offence was not committed in any place within the *exclusive* jurisdiction of the United States, the right of Congress to legislate for its punishment can be founded only on the notion that it was an offence against Federal sovereignty. But Congress has never claimed, and cannot lawfully exercise the power of legislating for Indians, except as *tribes* or *quasi* domestic nations. When they lose this relation and character, and become citizens of a State, or as individuals become separated from their *ordinary* tribal connections, they pass from the jurisdiction of the United States. The

limits of the agency are established, as all know, by tribes or geographical boundaries. The general duty of the agent is to manage and superintend the *intercourse with* the Indians. This assumes their separate and social condition.

The facts show that, in the case of Otibeko, to whom in Holliday's case the liquor is said to have been sold, the tribal organization was, in fact, dissolved. The lands given to the Chippeways, it is plain, were owned in severalty; and all that remained of the tribal association was connected with the convenience of paying annuities. This Indian, moreover, became a citizen of the State of Michigan.

Conceding, for the sake of the argument, that the Indian was a member of a subsisting tribe, and under the charge of an Indian agent; still, *after he came within the limits of the State*, away from the Indian country, or any Indian reservation, he became subject to the laws of the State, and it was incompetent for the United States to take cognizance of the act charged, and to punish it as a crime against the Federal government. The whole subject of the regulation of the use and sale of liquors, within the State, and away from Indian reservations, is a matter for the State, in the exercise of its police powers. The State of Michigan has exercised this power, and prescribed the penalty, and the offence was within the jurisdiction of that State.*

This legislation, as construed by the government in this case, cannot be sustained under the power of Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; for the act of 1862 is not, in any way, a regulation of commercial intercourse.

After a thorough argument, *contra*, *by Mr. Assistant Attorney-General Ashton*, who went into the whole policy of the government as respects sales of liquor to the Indians, setting forth the statutes regarding them, and the decisions which bore upon them,

* United States v. Beavans, 3 Wheaton, 336.

Mr. Justice MILLER delivered the opinion of the court.*

The questions propounded to this court in the two cases have a close relation to each other, and will be disposed of in one opinion.

The first question on which the judges divided in the case against Haas is, "whether, under the act of February 18, 1862, the offence for which the defendant is indicted was one of which the Circuit Court could have original jurisdiction."

Previous to the act of July 15, 1862, no Circuit Courts existed in the districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, but the District Courts in those districts exercised the powers of Circuit Courts. It was during this time that Haas was indicted and convicted; and a motion in arrest of judgment was pending and undetermined when that act went into effect. That act, by its own terms, transferred to the Circuit Courts which it created—one of which was in the District of Minnesota—all causes, civil or criminal, which might have been brought, and could have been originally cognizable in a Circuit Court. If, then, the offence for which Haas was indicted was one which could have been originally cognizable in a Circuit Court, it was properly in that court for final determination; otherwise it was not.

The act under which the indictment was found says, that if any person shall commit the offence therein described, "such person shall, on conviction before the proper District Court of the United States, be imprisoned," &c.

So far as the act itself provides a court for its enforcement it is the District Court, and not the Circuit Court.

An examination, however, of the several acts, which define generally the relative jurisdiction of the District and Circuit Courts of the United States, leaves no doubt that, in regard to all crimes and offences, it was intended to make the jurisdiction concurrent, except in cases where the punishment is death. In that class of offences the jurisdiction

* Nelson, J., not sitting, having been indisposed.

is exclusive in the Circuit Courts. The present offence, however, is created after all of those acts were passed, and the law defining it only confers jurisdiction on the District Court. Can the statutes, or any of them which give the Circuit Courts concurrent jurisdiction of offences cognizable in the District Courts, be held to have a prospective operation in such case as the present?

The 12th section of the Judiciary Act, which created both the Circuit and District Courts, says of the former, they "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of crimes and offences cognizable therein."

This provision has distinct reference in its first clause to cases of which the Circuit Courts shall have exclusive jurisdiction, and, in its latter clause, to cases in which they shall have concurrent jurisdiction with the District Courts. The former include all crimes and offences where some statute does not provide the contrary. The latter include all crimes and offences cognizable in the District Courts.

The Judiciary Act of 1789, of which these provisions constitute a part, is the one which, for the first time under our Federal Constitution, created the courts which were to exercise the judicial function of the government. The powers conferred by that act on the several courts which it created, and the lines by which it divided the powers of those courts from each other, and limited the powers of all of them under the Constitution, were intended to provide a general system for the administration of such powers as the Constitution authorized the Federal courts to exercise. The wisdom and forethought with which it was drawn have been the admiration of succeeding generations. And so well was it done that it remains to the present day, with a few unimportant changes, the foundation of our system of judicature, and the law which confers, governs, controls, and limits the powers

of all the Federal courts, except the Supreme Court, and which largely regulates the exercise of its powers.

It cannot be supposed, under these circumstances, that in giving to the Circuit Courts jurisdiction of all crimes and offences cognizable in the District Courts, it was intended to limit the grant to such cases as were then cognizable in those courts. In fact, there was, at the time this statute was passed, no such thing as an offence against the United States, unless it was treason, as defined in the Constitution. It has been decided that no common law crime or offence is cognizable in the Federal courts. The Judiciary Act organizing the courts was passed before there was any statute defining or punishing any offence under authority of the United States. This clause, then, giving the Circuit Courts concurrent jurisdiction in all cases of crime cognizable in the District Courts, must, of necessity, have had reference to such statutes as should thereafter define offences to be punished in the District Courts.

The offence, then, for which Haas was indicted, although declared by that act to be cognizable in the District Courts, was, by virtue of the act of 1789, also cognizable in the Circuit Courts.

The second question in that case is this: whether, under the facts above stated, any court of the United States had jurisdiction of the offence?

The facts referred to are, concisely, that spirituous liquor was sold within the territorial limits of the State of Minnesota and without any Indian reservation, to an Indian of the Winnebago tribe, under the charge of the United States Indian agent for said tribe.

It is denied by the defendant that the act of Congress was intended to apply to such a case; and, if it was, it is denied that it can be so applied under the Constitution of the United States. On the first proposition the ground taken is, that the policy of the act, and its reasonable construction, limit its operation to the Indian country, or to reservations inhabited by Indian tribes. The policy of the act is the protection of those Indians who are, by treaty or otherwise,

under the pupilage of the government, from the debasing influence of the use of spirits; and it is not easy to perceive why that policy should not require their preservation from this, to them, destructive poison, when they are outside of a reservation, as well as within it. The evil effects are the same in both cases.

But the act of 1862 is an amendment to the 20th section of the act of June 30, 1834, and, if we observe what the amendment is, all doubt on this question is removed. The first act declared that if any person sold spirituous liquor to an Indian *in the Indian country* he should forfeit five hundred dollars. The amended act punishes any person who shall sell to an Indian under charge of an Indian agent, or superintendent, appointed by the United States. The limitation to the Indian country is stricken out, and that requiring the Indian to be under charge of an agent or superintendent is substituted. It cannot be doubted that the purpose of the amendment was to remove the restriction of the act to the Indian country, and to make parties liable if they sold to Indians under the charge of a superintendent or agent, wherever they might be.

It is next asserted that if the act be so construed it is without any constitutional authority in its application to the case before us.

We are not furnished with any argument by either of the defendants on this branch of the subject, and may not therefore be able to state with entire accuracy the position assumed. But we understand it to be substantially this: that so far as the act is intended to operate as a police regulation to enforce good morals within the limits of a State of the Union, that power belongs exclusively to the State, and there is no warrant in the Constitution for its exercise by Congress. If it is an attempt to regulate commerce, then the commerce here regulated is a commerce wholly within the State, among its own inhabitants or citizens, and is not within the powers conferred on Congress by the commercial clause.

The act in question, although it may partake of some

of the qualities of those acts passed by State legislatures, which have been referred to the police powers of the States, is, we think, still more clearly entitled to be called a regulation of commerce. "Commerce," says Chief Justice Marshall, in the opinion in *Gibbons* v. *Ogden*, to which we so often turn with profit when this clause of the Constitution is under consideration, "commerce undoubtedly is traffic, but it is something more; it is intercourse." The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

If the act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and, therefore, comes within the terms of the constitutional provision.

Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the act regulating it unconstitutional?

In the same opinion to which we have just before referred, Judge Marshall, in speaking of the power to regulate commerce with foreign states, says, "The power does not stop at the jurisdictional limits of the several States. It would be a very useless power if it could not pass those lines." "If Congress has power to regulate it, that power must be exer-

cised wherever the subject exists." It follows from these propositions, which seem to be incontrovertible, that if commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian tribes.

These views answer the two questions certified up in the case against Haas, and the two first questions in the case against Holliday.

The third question in Holliday's case is, whether, under the circumstances stated in the plea and replication, the Indian named can be considered as under the charge of an Indian agent, within the meaning of the act?

The substance of the facts as set out in those pleadings is, that the Indian to whom the liquor was sold had a piece of land on which he lived, and that he voted in county and town elections in Michigan, as he was authorized to do by the laws of that State; that he was still, however, so far connected with his tribe, that he lived among them, received his annuity under the treaty with the United States, and was represented in that matter by the chiefs or head men of his tribe, who received it for him; and that an agent of the government attended to this and other matters for that tribe. These are the substantial facts pleaded on both sides in this particular question, and admitted to be true; and without elaborating the matter, we are of opinion that they show the Indian to be still a member of his tribe, and under the charge of an Indian agent. Some point is made of the

dissolution of the tribe by the treaty of August 2, 1855; but that treaty requires the tribal relation to continue until 1865, for certain purposes, and those purposes are such that the tribe is under the charge of an Indian superintendent; and they justify the application of the act of 1862 to the individuals of that tribe.

Two other questions are propounded by the judges of the Circuit Court for the Eastern District of Michigan, both of which have relation to the effect of the constitution of Michigan and certain acts of the legislature of that State, in withdrawing these Indians from the influence of the act of 1862.

The facts in the case certified up with the division of opinion, show distinctly "that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved." In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress. This control extends, as we have already shown, to the subject of regulating the liquor traffic with them. This power residing in Congress, that body is necessarily supreme in its exercise. This has been too often decided by this court to require argument, or even reference to authority.

Neither the constitution of the State nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of the State the supreme law of the land, instead of the Con-

stitution of the United States, and the laws and treaties made in pursuance thereof.

If authority for this proposition, in its application to the Indians, is needed, it may be found in the cases of the *Cherokee Nation* v. *The State of Georgia*,* and *Worcester* v. *The State of Georgia*.†

The results to which we arrive from this examination of the law, as regards the questions certified to us, is, that both questions in the case against Haas must be answered in the affirmative; and in the case against Holliday, the first three must be answered in the affirmative, and the last two in the negative.

It is, however, proper to say, that in the fourth question in the latter case is included a query, whether the Indian, Otibsko, was a citizen of the State of Michigan?

As the views which we have advanced render this proposition immaterial to the decision of the case, the court is to be understood as expressing no opinion upon it.

DE SOBRY v. NICHOLSON.

1. A motion to dismiss a case, from want of proper citizenship in the parties, cannot be made at the trial and after pleading a general issue and special defences.
2. Where a contract, under which a party would be prevented, from want of proper citizenship, from suing in the Federal courts, is set out but as inducement to a subsequent one under which he would not be so prevented, the jurisdiction of such courts will not be taken away from the fact of the old contract's being set forth as inducement only somewhat indefinitely. Coming, in such a case, within the principle of a contract defectively stated, but not of one defective, the mode of stating it is cured by the verdict.

THE Judiciary Act declares that the assignee of a chose in action shall not recover in a suit brought on it in the Fede-

* 5 Peters, 1. † 6 Id. 515.

ral courts, "unless a suit might have been prosecuted in such courts, &c., *if no assignment had been made.*"

With this provision in force, a partnership in Pennsylvania, of which a certain Nicholson was one member, and Armstrong and others the remaining partners, made a contract with De Sobry, of Louisiana, "to build a mill" on his plantation. The Pennsylvania partnership, after the contract was made, went into liquidation, Nicholson remaining the liquidating partner; and after it had gone into liquidation, Armstrong became a resident of Louisiana, where, as already said, De Sobry also lived.

De Sobry not fulfilling his part of the contract, Nicholson brought suit against him in the Louisiana Circuit. Nicholson's declaration, or "complaint," as the old *narratio* appears to be called in that State, originally French, set forth the contract of De Sobry (entitled of Louisiana) with the Pennsylvania firm, the firm's then citizenship in Pennsylvania, the dissolution of the firm "*before* the completion of the contract," and that he, Nicholson, of Pennsylvania, "became liquidator of its affairs and owner of all its contracts." The plaintiff then represented that "the contract was fully executed on *his* part," and that the mill had been completely "put up and delivered, according to the contract on *his* part."

The defence of De Sobry, denying generally the allegations of Nicholson, and that Nicholson was "the transferree" of the Pennsylvania firm, and showing further wherein the contract was not fulfilled, prayed that judgment might be rendered, "in reconvention (cross-demand), in his favor, against the *said Nicholson.*"

On the trial the defendant proved the fact that, at the time of the suit brought, Armstrong was, with De Sobry, a resident of Louisiana, and moved to dismiss the case for want of *jurisdiction*, under well-known principles of the court, for identity of citizenship between the parties suing.

The court overruled the motion; and the defendant excepting, the case, after verdict and judgment for the plaintiff, came here on error.

Argument for the plaintiff in error.

Mr. Dobbin, for the plaintiff in error: The citizenship of the parties to the proceeding is no doubt sufficiently set forth; but it is not so as to that of the members of the *firm* with whom De Sobry, the here plaintiff in error, is alleged to have entered into the contract on which the action is founded. The allegation as to *their* citizenship does not refer to the time of the institution of the *suit*, as it should do, but to the date of the contract. Since that date and before bringing the suit it was changed. The language of the Judiciary Act would seem to establish, by itself, without need of interpretation, that whenever there is a suit upon a chose in action assigned, the assignor must be (and of course must be distinctly alleged to be) a citizen of a different State from that of the defendant, *at the time of suit brought.* And this is conceded by the authorities.*

That the defendant in error claims as assignee, is manifest from the petition itself; for, according to its allegations, he was but one of the original contractors, and only became "owner" of the contract upon the dissolution of the firm, the date of which is not set forth. Of course, he could only have acquired the sole interest in a joint contract by assignment of the interests of his co-contractors. Nor does he even aver that he himself wholly performed the contract, or that no part of it had been performed before he became owner. On the contrary, he only and cautiously charges that he became owner "before the *completion* of the contract," and the part which he alleges that he performed was simply that of "delivering" and "putting up" the mill; not that of "building" it, which was the heaviest part of the job for which the contract provided.

The case, therefore, stands upon the ordinary ground of a *chose in action* assigned, and is not only not excluded from the operation of the Judiciary Act, but seems to be clearly brought within it by the decision in *McMicken* v. *Webb*,† in this court.

* See Milledollar v. Bell, 2 Wallace, Jr., 384, 388, and cases cited; Thaxter v. Hatch, 6 McLean, 68.

† 11 Peters, 25.

It may be added, with propriety, that the abuse of jurisdiction, against which the section of the Judiciary Act relied on by us was levelled as a matter of policy and in prevention of fraud, is quite as likely to occur by contrivance, in cases of original joint interests, alleged to have become afterwards sole, as in cases where the assignor and assignee had, originally, no connection in the transaction.

Mr. Wills, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

No exception can be considered here which was not taken in the court below.*

The point relied upon to reverse the judgment is not that the copartners of the plaintiff below could not assign their interests in the original contract so as to vest in him the right to sue in his own name alone, but that one of the assignors was, at the time of the commencement of the action, a citizen and resident of the same State with the defendant, and that hence the Circuit Court had no jurisdiction.

To this there are two answers.

The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue, it is too late. It cannot be raised at the trial upon the merits.† If a plea in abatement be filed with the general issue, the latter waives the former.‡ Where a plea in abatement is relied upon, the burden of proof rests upon the defendant.§ In equity, the defence must be presented by plea or demurrer, and not by answer.‖ The court below properly overruled the motion.

We think, also, that a new contract between the plaintiff

* Stoddard et al. v. Chambers, 2 Howard, 285; McDonald v. Smalley et al., 1 Peters, 620.

† Smith et al. v. Kernochen, 7 Howard, 216.

‡ Bailey v. Dozier, 6 Id. 80; Sheppard et al. v. Graves, 14 Id. 505.

§ Ib. 505, 512.

‖ Livingston v. Story, 11 Peters, 351.

and the defendant, and its execution by the plaintiff, are substantially averred, and that the original contract is set out as inducement. It is said by the counsel for the plaintiff in error, that if such a contract be alleged, it is done with careful ambiguity and indefiniteness. Conceding this to be so, it is a case, not of a defective title, but of a title defectively stated, which is always cured by the verdict.*

JUDGMENT AFFIRMED WITH COSTS.

BARREL v. TRANSPORTATION COMPANY.

A petition for an appeal to this court from the Circuit Court, filed in the office of the clerk of the Circuit Court merely, unaccompanied by an allowance of the appeal by that court, does not bring the case up. An appeal thus made dismissed.

MOTION by *Mr. Browning* (*Mr. Rae, contra*) to dismiss an appeal from the Circuit Court of the United States for the Northern District of Illinois.

The record showed that no appeal had been prayed or allowed in the Circuit Court. Accompanying the record, however, was a petition addressed to that court, which prayed for an appeal. This petition was dated on the 20th July, 1865, ten days after the decree, and was filed on the same 20th of July, in the office of the clerk of the Circuit Court.

The CHIEF JUSTICE: The motion to dismiss in this case must prevail. The proceeding in the case is not warranted by any act of Congress, and we have no authority to act on such a petition. The filing of it in the clerk's office, even if it could be regarded as addressed to the Circuit Court, would be of no avail, unless accompanied by an allowance of an appeal by that court; and in the case before us there was no allowance.

CASE DISMISSED.

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* 1 Chitty's Pleading (10th American ed.), 672.

THE IRON-CLAD ATLANTA.

1. On a question under the act of Congress of July 17, 1862, which distributes prize-money according to the fact whether the captured vessel is of equal or superior force to the vessel or vessels making the capture, it is proper to consider as the capturing force, not only the flag-ship, leading, actually firing and by her fire doing the only damage—immense damage—done; but also any other vessel, which by having diverted the fire of the vessel forced to surrender, by an obviously great force, by its position, conduct, and plain purpose to come at once into the engagement and to inflict perhaps complete destruction,—may have hastened the surrender.
2. Where captors appoint an agent to "represent their interest in prize-money," binding themselves, their heirs and executors to pay such agent one *per cent.* of all moneys which shall be collected and severally adjudged to them as such, requesting, by the instrument of appointment, "the proper officers of government to pay the said fee to the agent as a charge or fee to be deducted from the award of prize-money to be paid us, previous to paying over the same for distribution," the prize court has no power to award the percentage. The agent should apply to the proper officers of the government intrusted with the distribution of the money.

AN act of Congress* of July 17, 1862, provides that prizes taken by the navy at sea, when of *equal or superior* force to the vessel or vessels making the capture, shall be the *sole* property of the captors, and when of inferior force shall be *divided equally* between the United States and the officers and men making the "capture." When the United States thus receive prize-money it is passed to the Naval Pension Fund.

With this act in force the Atlanta, a vessel of the late rebel confederacy, was captured by our navy and condemned, with her armament and stores, as prize by the District Court for Massachusetts.

Before the vessel could be brought into port for adjudication she was taken by the Secretary of the Navy for the use of the government, and her appraised value, $351,000, deposited with the proper officers of the Treasury subject to the order of the court.

* 12 Stat. at Large, 750.

In distributing this fund so deposited the question arose between the United States and certain of the captors whether the captured vessel was of *superior* or of *inferior* force to the force which had captured her; the importance of the question being, of course, in this,—that if she was of superior, the captors would get the whole of her value: while, if of inferior, they would have to share it with the government.

The facts of the capture were thus:

The Atlanta—originally the British ship Fingal, and converted, by enormous labor and the cost of near a million of dollars, into a powerful iron-clad for the destruction of the government fleets, then blockading the rebel ports and coast —had been for some time previous to her capture anchored in Wassau Sound, Georgia. Two monitors of the United States, the Weehawken and the Nahant, guarded the entrance to prevent her egress. The captain of the Weehawken, Captain Rodgers, U. S. N., was the senior and commanding officer of the government force in that region, and the pilot was on board his monitor. *The presence of the monitors and their character and force were known to the rebels.* In the belief that the Atlanta was of superior force to both, she was sent down the sound to capture or destroy them; "General Beauregard," the log stated, or as Captain Rodgers testified, "the general commanding the rebel army in the military department of Charleston and Savannah"—following with a select party in a wooden gunboat behind to witness her anticipated conquest. It was early in the morning of the seventeenth of June, 1863, that her approach was descried by the monitors. These immediately prepared for action. The Weehawken, laying further up the sound than the Nahant, slipped her cable, and steamed towards the sea; the Nahant weighed her anchor and, under orders of Captain Rodgers, followed in the wake of the Weehawken. The vessels took their course towards the sea for the purpose of gaining time to get fully ready for engagement. After going out some distance, the Weehawken turned suddenly toward the enemy. At this moment the Atlanta opened her fire *on the Nahant*, which was then the nearer vessel to her, but

the shot did not take effect. The Nahant soon afterwards rounded, following the Weehawken, and the latter vessel, being now within between three and four hundred yards of the Atlanta, opened her fire, and when within two hundred yards repeated it. The first shot of the Weehawken, weighing *four hundred pounds* and fired with *thirty-five pounds of powder*,—the largest shot, it is said, ever fired in naval warfare,—struck the Atlanta upon the side of her casemate, knocking a hole in it, but without going through, and scattering over the inclosed decks great quantities of wood and and iron splinters, some of dangerous size, wounding several men, and prostrating on deck, insensible, many others. As many as forty persons were knocked down and either wounded or stunned for the moment by the effects of this shot, and it demoralized the entire crew. The next discharge carried a ball which struck the top of the pilot-house, crushing and driving down the bars on the top and sides, wounding both pilots and one helmsman, and stunning the other helmsman as well as the wounded men. These men fell in a heap on the floor of the pilot-house, and the rebel officers said prevented any one from getting up into it. In the words of Captain Rodgers, "the first shot took away the desire to fight, and the second the ability to get away." Such, in short, was the terrific effect of the Weehawken's shot, that the Atlanta *in a few minutes* surrendered. She had, in fact, struck after the first shot, though, in the smoke, her white flag was undistinguishable from a blue one used as her battle-flag. In the meantime, the Nahant was advancing with all practicable speed, making directly for the Atlanta, the captain reserving his fire until he could lay his vessel alongside the enemy, thinking that it could then be delivered with greater effect. The shortness of the period between the first fire of the Weehawken and the surrender of the Atlanta prevented the captain of the Nahant from accomplishing his purpose.

The capture of this iron-clad Atlanta was one of the early conclusive evidences that the rebel confederacy could not stand at all before the power of the government; and it was

justly regarded as a great event of the war. In its bearings upon naval science, and particularly upon naval gunnery, it has been thought to be the most significant battle of modern times except that of the Monitor and Merrimack.

The monitors were of 844 tons each; one had eighty-four men, the other eighty-five; together, 1688 tons, and one hundred and sixty-one men. They were as nearly equal to each other as could be. The Atlanta was of about 1000 tons, and had a hundred and forty-three men.

Upon this case the court below, considering that the Nahant had, in contemplation of law, taken part in the capture, and, therefore, that the capturing force was superior to the vessel captured, decreed one-half the fund to the captors, and the other half to the United States.

From this decree the officers and crew of the Weehawken appealed; a certain Hodge appealing also; the ground of his appeal being that the entire officers, crew, and hands—eighty-five persons in number—had by power of attorney appointed him their agent to represent their interest in the prize-money, binding themselves, their heirs and executors, to pay him one *per cent.* of all moneys which should be collected and severally adjudged to them as prize-money, and by the instrument of appointment requesting "the proper officers of government to pay the said fee to their said agent as a charge or fee, to be deducted from the award of prize-money to be paid to us, previous to paying over the same for distribution:" and that the court below had distributed the whole fund between the government and the captors without taking any notice at all of him, Mr. Hodge aforesaid.

Mr. Reverdy Johnson, for the appellants; the Attorney-General, Mr. Speed, and the Assistant Attorney-General, Mr. Ashton, not opposing, having in fact left the court-room in company of each other soon after the case was called.

What is a capturing force? Is it the vessel which took the only active part in the capture, or does it include the other vessels, present or within signal distance, who took no part in the action, and in no way contributed to the successful

result? There were on the Union side two monitors, the Weehawken and Nahant. The Weehawken, when she approached the enemy, was the leading vessel, followed by the Nahant. The Weehawken engaged the Atlanta, and compelled her to surrender before the Nahant could get into action or had fired a gun; she was, therefore, really the capturing force, unaided by the other monitor; and had the Nahant been absent, it is evident that all the circumstances and events of the fight, and the result, would have been precisely the same. The result was due simply to the tremendous effect of a single shot; a shot, the like of which the world never heard of, and of which science had not before conceived. The old rules of warfare were superseded by the use of novel engines of destruction. Whoever was first struck was conquered. Whoever fired *that* shot was victor. The Weehawken was notoriously a vessel of inferior force to her antagonist. Will it be said that the presence of other vessels has a great moral influence on the result (even if these other vessels do not take an active part), by discouraging the one side and encouraging the other? There might be some force in this argument, had the Atlanta suddenly fallen in with the two monitors at sea by the lifting of the fog or the breaking of the day, or had she in any other manner come unexpectedly upon them; but no such moral influence existed in this case; for the Atlanta—trusting in *her* strength, really very great, and supposed to be capable of resisting *any* shot, well knowing, too, what the opposing force was—came down proudly and with deliberation to attack the two monitors, with the conviction that she could take or destroy both. The result was caused simply by the extraordinary and novel sort of armament, of which neither she, nor till then any one but its inventors, had formed a conception.

The officers of all these iron-clad monitors have had, may it please the court, a most severe duty to perform. They have lived in iron dungeons, under artificial ventilation, never being able, as any one who has once seen a monitor

will readily believe, to appear on deck when afloat: the sea was constantly beating over them. They have been, too, without much hope and with only a slender chance of prize-money, as they were not cruising vessels. This in fact, we believe, is the only instance in which any of them has made a dollar of prize-money. This engagement was most important in its effects on the war. It did the highest honor to the naval reputation and resources of the United States abroad. If considerations of liberality are in any way to influence a decision, this is certainly a strong case for their exercise. We recall—needing but slightly to change it—the language of a great judge of past time in England, when speaking of a memorable case before him:* "Affection, indeed, may never press on Judgment; yet it is a case in which no man who hath any apprehension of nobleness, but would lay hold of *a twig or a twine-thread* to support so honorable a claim." Nearly every prize taken during the war has been by a superior force, as most of the prizes have been blockade-runners. In almost every case, therefore, the United States has received, for the Naval Pension Fund, half of the amount. That fund has thus, it is said, obtained nine to ten millions of dollars from captures. The income of the sum received is five-fold of all demands upon it. If it gets nothing here, there is nobody to complain, nobody to suffer.

It is obvious that the government is desirous that if the court *can* give the whole of this money to the gallant Rodgers and his crew, it will give it. The attorney-general and his young assistant—remarkable for the closeness and fidelity, as for the ability also, with which they protect in ordinary every interest of the government—have left this case undefended, as if willing to show, what without doubt they feel, that if the letter of the statute calls for a construction in favor of the government—which we deny—the case itself, and the just reward of bravery, and the spirit of the whole country, demand another.

* Sir William Jones, temp. Car. I; Case of the Earldom of De Vere, 1st Jones, 96.

As respects Mr. Hodge. The appointment given him by the captors was lawful and proper; as much for their benefit and for the interests of justice as for his own. He has done his duty. The vessel has been condemned as prize. The constant changes that are occurring in the naval service will render it impossible for him to trace up the eighty-five officers and men of these vessels, scattered as they are in the time since which the capture occurred. Some are dead. The Weehawken, it is matter of well-known and sad history, has been sunk, and between twenty and thirty of her crew drowned. Except under a decree of the court, Mr. Hodge is left without resource for collecting the percentage voluntarily allowed him by the brave captors.

Mr. Justice FIELD delivered the opinion of the court.

The act of Congress of July 17, 1862, provides that if the prize taken be of equal or superior force to the capturing vessel or vessels, the whole shall go to the captors, but if it be of an inferior force the proceeds shall be divided equally between them and the United States. The court below decided that the prize was of an inferior force, and, therefore, awarded only one-half of the proceeds to the captors; and from this decision the appeal is taken.

There is no dispute about the facts of the case; they are stated with accuracy and clearness in the opinion of the learned district judge, and we can do little more than repeat his argument, and affirm his conclusion upon the point presented for our consideration.

The Atlanta had been for some time previous to her capture in Wassau Sound, and the monitors, the Weehawken and the Nahant, guarded its entrance to prevent her egress. The presence of the monitors and their character and force were known to the rebels, but in the belief that the Atlanta was of superior force to both, she was sent down the sound to capture or destroy them. It was early in the morning of the seventeenth of June, 1863, that her approach was descried. The monitors immediately began to prepare for action. The Weehawken, lying further up the sound than the

Nahant, slipped her cable, and steamed towards the sea; the Nahant weighed her anchor and followed in the wake of the Weehawken. Both vessels took this course for the purpose of gaining time to get fully ready for the engagement. The Weehawken first turned toward the enemy. At this moment the Atlanta opened her fire on the Nahant, then being the nearest vessel to her, but her shot did not take effect. The Nahant soon afterwards rounded, following the Weehawken, and the latter vessel, when within between three and four hundred yards of the Atlanta, opened her fire, and when within two hundred yards repeated it, and such was the destructive effect of her shot, that the Atlanta in a few minutes surrendered. In the meantime, the Nahant was advancing with all practicable speed, making directly for the Atlanta, the captain reserving his fire until he could lay his vessel alongside the enemy, thinking that it could then be delivered with greater effect. The shortness of the period between the first fire of the Weehawken and the surrender of the Atlanta prevented the captain of the Nahant from accomplishing his purpose.

The point presented is whether, under these circumstances, the Nahant is to be regarded as one of the capturing vessels within the meaning of the act of Congress. The importance of the point is this: the Weehawken was confessedly inferior in force to the Atlanta, and if she is alone to be regarded in the comparison of forces, the whole prize-money goes to the captors. On the other hand, the combined force of the two monitors was superior to that of the Atlanta, and if both are to be regarded as capturing vessels, only one-half of the prize-money goes to the captors, and the decree must be affirmed.

The mere fact that the only shot fired, and the only damage done, was by the Weehawken, is not decisive. Other circumstances must be taken into account in determining the matter—such as the force, position, conduct, and intention of the Nahant. The two vessels were known to be under the same command, and of nearly equal force. The

Atlanta descended the sound to attack both, and governed herself with reference to their combined action. It is not reasonable to suppose that her course would have been the one pursued, had she had only the Weehawken to encounter. Besides, the fire of the Atlanta was directed entirely to the Nahant, and of course diverted from her consort. It is possible that a different result might have followed had the fire been turned upon the Weehawken. This diversion must be considered in every just sense of the terms as giving aid to her. Again, the power of the shot of the Weehawken had evidently surprised the officers of the Atlanta, who found their vessel speedily disabled and their crew demoralized. The advance upon her, at full speed, of a second monitor, of equal force, ready to inflict similar injuries, may have hastened the surrender. It can hardly be supposed that the approach of the second monitor did not enter into the consideration of the captain and officers of the Atlanta. If the shot from the guns of one of the monitors could, in a few moments, penetrate the casemate of the Atlanta, crush in the bars of her pilot-house, and prostrate between forty and fifty of her men, her captain might well conclude that the combined fire of both would speedily sink his vessel and destroy his entire crew. It cannot be affirmed, nor is it reasonable to suppose, that any of the incidents of the battle would have occurred as they did, if the Nahant had not been present in the action.

We concur, therefore, in the view of the learned district judge, that in the comparison of the forces engaged in the conflict, the Nahant must be included with the Weehawken.

We fully appreciate the observations of counsel as to the arduous service of the officers and crews of our iron-clad monitors, but considerations of this character, or admiration of conduct of highest merit are not allowed to influence our decision, and however much we might feel disposed to do so, we are not at liberty to award to the gallant officers and men of the Weehawken and Nahant the entire proceeds of the prize. Our duty is simply to announce and apply the law; and there our power ends.

The appeal of Hodge, the agent of the officers and crews of the monitors, is dismissed. The court below had no power to award payment from the prize-money of the compensation which was agreed upon between these parties. He must apply, under his power of attorney, to the proper officers of the government charged with the distribution of the money.

The decree of the court below is

AFFIRMED.

PERALTA v. UNITED STATES.

1. Written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, if coming from private hands, is insufficient to establish a Mexican grant if there is nothing in the public records to show that such evidence ever existed; though the court remarks that if the claimant can show to the satisfaction of the court that the grant has been made in conformity to law and *recorded*, and that the record has been lost or destroyed, he will then be permitted to give secondary evidence of its contents.
2. A bare possession for a year before our conquest of California insufficient to establish an equity in opposition to the above first-announced rule.
3. In this case the court enforces the necessity of adhering to general rules when experience has demonstrated their wisdom, even though, sometimes, adherence to them should make cases of individual hardship.

APPEAL from the decree of the District Court for Northern California on a claim presented in 1853, by Maria de Valencia, for herself and others, heirs of Teodora Peralta, for a piece of land in California on which they were living; the claim being founded on a grant alleged by them to have been made in the spring of 1846 to the said Teodora by Governor Pio Pico. The case had come of course to the District Court on an appeal from the Board of Land Commissioners established by the act of March 3, 1851, to settle private land claims in California.

The expediente which was produced by the claimant showed that in 1845, the Señora Peralta petitioned the alcalde of San Rafael to obtain a report from the neighbors or *colindantes* of the tract which she desired to solicit from

the government, in order that the report might accompany her petition to the governor for a grant of the land. On the same day the magistrate certified that the colindantes had stated before him that the *sobrante* or surplus asked for was vacant and might be granted. On the 8th November, 1845, she presented a petition to the prefect, in which she set forth her previous application to the alcalde and the report of that officer, and requesting him to take such further proceedings as might be necessary. This petition was referred by the prefect to the sub-prefect, and by the latter to the first judge of San Rafael. On the 29th November the first judge reported the land to be vacant. On the 20th December the prefect recommended to the governor that the title issue. And on the 18th February, 1846, the governor attached to the expediente an order to that effect.

The expediente containing all these documents was *produced by the claimant. The archives contained no record or trace whatever of any of these proceedings.*

There seemed no reason, perhaps, to doubt the genuineness of any of the papers except the last and most important of all, viz., the order by the governor that the title issue. This order and the signature were evidently in Pico's handwriting, but the court below noted that his signature on this particular document bore little resemblance to his signatures elsewhere found in the archives, the uniform and striking peculiarities of which it had frequently commented upon; but, on the contrary, resembled the mode of signing his name, and especially of forming the letter "P" in it, adopted by him at a much later period.

No explanation was offered of the circumstance that the expediente was found in the claimant's possession.

The Señora Peralta, mother of the petitioner, belonged, it was said, to a well-known and good family, and was a native of the region, with a perfectly fair character. One witness swore that she was occupying the land in 1844; another that she was on it even a year earlier.

The petition itself (or an *amended petition rather*, which differed in important respects from the original petition) set

forth that title, a written document of concession signed by Pio Pico, did in fact issue, granting the land to the said Teodora Peralta; that, as the petitioner was informed and verily believed, the said document of concession, and also a map of the land, and a certificate of possession thereof, were delivered to the said Teodora Peralta, at the time of the said granting of said land, and within the knowledge and distinct recollection of the petitioner, were held and possessed by the said Teodora during her lifetime; that until within a short period the petitioner, and, as she was informed and verily believed, the rest of the heirs, had believed the same to be on file along with the said expediente in this cause; that the petitioner had made and caused to be made diligent search therefor without finding the same, and that she verily believed that the same had become lost or destroyed since the death of the said Teodora.

One of the daughters of Madame Peralta swore to her reception of the grant, and that for about a year previous to its delivery she had been in occupancy under a provisional license, although the case showed no record evidence of the same.

The Board of Land Commissioners, admitting that the proofs of occupancy and cultivation were satisfactory, and that, if the parties had used the proper diligence in procuring the issue of the grant and judicial measurement and formal possession, there might have been no difficulty in the case, still considered that in the absence of the issue of the grant, and a segregation of the land, they could do nothing but reject the claim.

The District Court was apparently of this same view: observing that the reports of the alcalde, the prefect, &c., showed that the Señora Peralta would have had no difficulty in obtaining the land, if she had followed out her original purpose; that the case was thus a hard one for the claimant, or rather her heirs, since she herself was now dead; but still declaring that if by accident or neglect she had failed to get what she might have laid a good foundation for obtaining, and but for accident or neglect might perhaps have got,

in fact, the misfortune was one which that court could not remedy.

Messrs. Speed, A. G., and Wills, for the United States, relied on numerous decisions in this court, of which *Romero* v. *United States*,* a leading case on the subject, and which Mr. Wills noted had been argued by Mr. Black, adverse counsel here, in opposition to the positions which he would be compelled now to maintain, was one. The counsel also contended that the case had been even more than benignantly enough considered by the Land Commission and by the court below; it being, as was evident from the amendment of the petition in important particulars (afterthoughts plainly), and from the positive oath made by Madame Peralta's daughter as to having seen a petition of which no record could be found, and from other circumstances not necessary to be detailed, a case less of misfortune and accident than of a fraudulent kind.

Mr. J. S. Black, contra, acknowledging the rule set up by the other side to be generally true, sought to take the case out of it as an exception; he denied all fraud, and referring to *United States* v. *Alviso*,† where there was no archive evidence, and to other cases, submitted that the difficulty, suggested by the fact that the expediente was not found in the archives but was produced by claimants, was fairly explained by the reasonable presumptions, arising from the proof of a *bona fides* from the very beginning, confessed both by the Land Commission and the District Court, of the meritorious qualifications of the grantee; of the integrity of her documentary evidence; of its transmission to and reception from the government authorities; of the undoubted continuity of her possession and claim, accompanied by actual occupation and cultivation, as the permanent family home for a period of some ten years, and under a well-known and recognized

* 1 Wallace 721; see also White v. United States, 1 Id. 660, and Pico v. Same, 2 Id. 279.

† 23 Howard, 318.

claim of title; that it was also met and explained by the irregularity and want of system shown, as he argued, by various cases which he cited from the Appendix to Hoffman's Reports and from the California Archives and Records, to have existed in the registry and record of Mexican land grants as aforesaid. He argued also that it was accounted for by the analogy of the numerous other cases which could be cited, and which showed, as he considered, that in many claims of undoubted *bona fides* and merit which had been held on behalf of the government to be good and entitled to patent, the expedientes were in some manner returned to the Mexican grantees, and were thus not found in the archives, but in the possession of the claimants themselves, and were by them produced before the Land Commission or United States District Courts, unauthenticated by any archive evidence whatever.

He had himself, it was true, as much perhaps as any counsel at this bar, supported as a general rule, the rule which the other side would apply as an inflexible one to this case. But on previous cases he was stating a rule, not the exceptions to it. Of course he did not overlay his arguments as if he were writing a text-book, with a consideration of everything that might, could, would, should, or possibly ought to qualify his general propositions. The case here was different. It was an exception to a rule, and the rule was to be applied so as to subserve and not so as to destroy justice.

The whole matter rested in judicial construction. It was not an affair of statute. To apply previous decisions on general cases to a case purely exceptional, would be to judge without discrimination. "Statutes," said Hobart, C. J.,* "are like tyrants: where they come they make all void; but the common law is like a nursing father, and makes void that part only where the fault is and leaves the rest." Even statutes, however, and statutes where the language is positive—the statute of frauds being a well-known instance—have been largely qualified so as to prevent rules intended

* 1 Modern, 86.

for general cases operating to do injustice in such special ones, as they were really meant not for.

Mr. Justice DAVIS delivered the opinion of the court.

This claim cannot be sustained, according to the rules of evidence which this court has established to determine the validity of Mexican titles in California. We are asked to relax the severity of those rules in this case, because it is alleged to be meritorious. Courts administer justice by fixed rules, which experience and wisdom have demonstrated are necessary in the investigation of truth. There will sometimes, in applying those rules to the various affairs of life, be cases of individual hardship; but this does not prove that the rules are unwise, or not the best that can be adopted for the purposes of judicial investigation. The right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions.

The treaty of Guadalupe Hidalgo imposed the obligation on this government to protect titles to land in California acquired under Mexican rule. The country was new, and rich in mineral wealth, and attracted settlers, whose industry and enterprise produced an unparalleled state of prosperity. The enhanced value given to the whole surface of the country by the discovery of gold, made it necessary to ascertain and settle all private land claims, so that the real estate belonging to individuals could be separated from the public domain. Yielding to this necessity, and in obedience to the obligations of the treaty, Congress passed an act on the 3d of March, 1851, to accomplish this purpose. The laws and usages of the Mexican government, as administered in California before the conquest of the country, and the principles of equity, were prescribed as rules which should govern the courts in adjudicating the questions of title. Very many claims were tested by these rules, and found to be valid, and were confirmed; others were imperfect and could not be recognized. Then commenced a struggle, which has never been abandoned, to induce the

courts to fritter away the act of Congress, and substitute parol proof for record evidence. The history of the cases in this court from California, show the extent of the struggle and the result. We have refused to allow oral testimony to prevail when archive evidence was necessary.

The colonization regulations of 1828 constitute the "laws and usages" by which the validity of a Mexican title is to be determined. It is not important to restate the nature and extent of those regulations, for they have been so often commented on that they are familiar to the profession. The Mexican nation attached a great deal of form to the disposition of its lands, and required many things to be done before the proceedings could ripen into a grant. But the important fact to be noticed is, that a *record* was required to be kept of whatever was done. This record was a guard against fraud and imposition, and enabled the government to ascertain with accuracy what portions of the public lands had been alienated. *The record was the grant*, and without it the title was not divested. The governor was required to give a document to the party interested, which was evidence of title, and enabled him to get possession; but this "titulo" did not divest the title, unless record was made in conformity with law.

Written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands and there is nothing in the public records of the country to show that such evidence ever existed. But it may be said that the archives of the country may be lost or destroyed, and if so, that the party in interest should not suffer. This is true; and if the claimant can show, to the satisfaction of the court, that the grant was made in conformity to law and *recorded*, and that the record of it has been lost or destroyed, he will then be permitted to introduce secondary evidence of it. But the absence of record evidence is necessarily fatal, unless that absence can be accounted for. Testing the case in hand by these principles of law, it cannot be confirmed. There is neither a

grant nor archive evidence. If there had been a grant according to law, the expediente would have remained in the archives; but there is no trace of it there, and it is produced from private hands, which tends strongly to show that the governor never saw it. If the grant had been made, and recorded in the proper office, possession would have been given to the grantee of the lands which were conveyed. This was not done, and no reason is assigned for the omission. There are circumstances in proof which are calculated to cast suspicion on this claim, but we forbear to notice them.

It is said that an equity arises on account of possession. But the bare possession is too limited to raise any substantial equity, because the claimant only occupied the place about a year before the conquest of the country.

DECREE AFFIRMED.

UNITED STATES v. CUTTING.

Under the Internal Revenue Act of June 30, 1864, as amended by the act of March 3, 1865, the sales of stocks, bonds, and securities made by "*brokers*" for themselves are subject to the same duties as those made by them for others.

THE Internal Revenue Act of 30th June, 1864,* declares by its 99th section as follows:

"All *brokers* and bankers doing business as brokers, shall be subject to pay the following duties and rates of duty upon the sales of merchandise, produce, gold and silver bullion, foreign exchange, promissory notes, stocks, bonds, or other securities, &c., and shall also be subject to all the provisions, &c., of the act for making returns, assessments, and collection of the duties."

The ninth paragraph of the 79th section says:

"Brokers shall pay $50 for each license. Every person, firm, or company (except such as hold a license as banker),

* 13 Stat. at Large, 218.

whose business it is as a broker to NEGOTIATE purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or *other securities*, shall be regarded as a broker, [and shall make oath or affirmation that all their transactions are made for a commission."]

On the 3d March, 1865, Congress passed an act to amend the former act.* This last act amends the former, by inserting, after the words "*other securities*" (given above in italics) the words "*for themselves* or others;" and by striking out from the paragraph that part of it included above in brackets.

In this state of the statutes, as assumed by the court, Cutting & Co., duly licensed as "*brokers*," besides having bought and sold stocks, bonds, and securities *for others*, had sold on their *own account other stocks, bonds, and securities, of which they were themselves the owners at the time. On these last* they refused to pay any duty; and suit being brought by the United States to recover the duty, the question here, on error to the New York Circuit, was, whether they had refused rightfully; in other words, whether one licensed as a "broker" only, was liable to pay duty on his own stocks sold on his own account. The Circuit Court thought that he was not.

The case, which largely concerned, of course, both the government and great numbers of persons in all our large cities, was thoroughly and ably argued by *Mr. Speed, A. G., for the United States, and by Messrs. Allen, Burrill, and Ecarts, contra.* The matter involving, however, nothing but the construction of a statute of immense length hastily drawn of necessity in many of its provisions, and liable to be amended indefinitely, even the ability which marked the discussion would not compensate the general reader for the space which any presentation of it would require.

Mr. Justice GRIER delivered the opinion of the court.

The act of 30th June, 1864, is entitled "An act to provide

* 13 Stat. at Large, 469.

ways and means for the support of government and for other purposes." It imposes specific taxes upon a large list of articles manufactured or sold, and prescribes the mode of assessing and collecting them. In addition to these, it imposes certain taxes on all persons carrying on certain "trades or professions" enumerated. The persons on whom this tax is assessed receive what is called a "license," which is the evidence of permission to exercise such trade or calling in consequence of payment of this tax or duty. Among these is the trade or employment of broker, mentioned in the ninth paragraph of the 79th section of the act. Brokers are required to pay fifty dollars for a license. The act also defines the term broker to "be one whose business it is to negotiate purchases or sales of stocks, exchange, coined money, bank notes, promissory notes, or other securities." Other species of the genus broker are indicated by the affix to the general term, as well as by special definition, such as "pawn brokers," "cattle brokers," &c., &c. Besides, the tax paid by auctioneers and the different species of brokers under form of a license or permission "to prosecute their trade, business, or profession," they were required to pay certain duties on the sales made by them respectively.

Being by means of these licenses brought within the cognizance of the revenue officers, and into a quasi-official relation with them, they were required to make "returns, assessment, and collection of these duties," under certain penalties. By the 99th section "all brokers, and bankers doing business as brokers, shall be subject to pay the following duties and rates of duty upon the sales of merchandise, produce, gold and silver bullion, foreign exchange, promissory notes, stocks, bonds, or other securities, &c., and shall also be subject to all the provisions of the act for making returns, assessments, and collection of the duties."

Now, the 9th paragraph of the 79th section, after defining a broker to be one "whose business it is, as a broker, to negotiate purchases or sales," &c., required him also to make oath "that all his transactions are made for a commission." This clause might have been construed to forbid a licensed

broker to purchase or sell stocks, &c., on his own account, so that his sales being made through the interposition of another broker, might be made liable to tax. But it has been construed to release him from the necessity of making any return of sales made for himself, or from paying any tax on such sales.

But there was no good reason why these transactions in stocks, bullion, &c., by a broker, for his own profit, should not be liable to the same tax or duty imposed on those made by him for other parties. Besides, such construction gave great opportunities of evading the tax altogether. To obviate this difficulty, an act was passed on 3d of March, 1865, to amend the act of 30th June, 1864. Among other things it amends the ninth paragraph of section 79, by inserting after the words "other securities" the words "*for themselves or others*," and by striking out from said paragraph the words "and shall make oath or affirmation that all his transactions are made for a commission."

The intention of this amendment might have been better provided for by an amendment of the 99th section, but it cannot be doubted that the meaning of the act was to subject sales made by a broker for himself to the same tax as those made for others.

The definition of a broker will now read, in the section as amended, "whose business it is, as broker, to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or other securities, *for themselves or others.*"

That it was the intention of Congress to subject the sales made by brokers for themselves to the same duties as those made by them for others, cannot admit of a doubt, though it must be admitted their intention is rather obscurely expressed.

The judgment below is reversed and a

VENIRE DE NOVO AWARDED.

[See the next case.—REP.]

UNITED STATES v. FISK.

"Bankers" who sell the Federal securities no otherwise than for the United States and for themselves, and who, therefore, do not sell them for others or for a commission, are not liable to pay the duties imposed by the 99th section of the Internal Revenue Act, of June 30, 1864, imposed upon "brokers and *bankers doing business as brokers*."

THE "Internal Revenue Act," of 30th June, 1864, "to provide ways and means for the support of government, and for other purposes," declares, by its 99th section, as follows:

"All brokers and *bankers doing business as brokers*, shall be subject to pay the following duties and rates of duty upon the sales of merchandise, produce, gold and silver bullion, foreign exchange, promissory notes, stocks, bonds, or other securities, and shall also be subject to all the provisions of the act for making returns, assessments, and collection of the duties."

The ninth paragraph of the 79th section of the same act says:

"*Brokers* shall pay $50 *for each license.* Every person, firm, or company (except such as hold a license as banker), whose business it is as a broker to *negotiate* purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or *other securities*, shall be regarded as a broker [and shall make oath or affirmation that all their transactions are made for a commission]. *provided* that any person holding a license as a banker shall not be required to take out a license as a broker."

On the 3d of March, 1865, Congress passed an act to amend the former act. The last act amends the former by inserting, after the words "*other securities*" (given above in italics), the words "for *themselves* or others;" and by striking out from the paragraph that part of it above included in brackets.

In this state of the statutes it was decided, in the preceding case of *United States* v. *Cutting*, that "brokers" were liable to pay the duties and rates of duty prescribed by

the 99th section of the act of 1864, whether the sales were made for themselves or for others.

In the present case a different question arose.

Fisk & Co. were *bankers*, doing a general business *as such*, making returns, and paying duties and taxes imposed by law upon their capital and deposits. As such they negotiated and *sold for the United States* large amounts of government securities. At the same time they bought and sold *government securities for themselves, and not for others or for a commission.*

The distinction, then, between the two cases was:

1. That, in the present case, the defendants were licensed as "bankers," and carried on the business of banking and nothing else, and did not act as "brokers;" while the defendants in the preceding case were licensed as "brokers," and did business as such, as well as on their own account.

2. That the sales by the defendants in this action, upon which the duty was sought to be recovered, were of government securities only, held and owned by them in their own right; while the sales by the defendants in the preceding case embraced other stocks, bonds, and securities, as well as government securities.

On a suit by the government against Fisk & Co., for duties on sales made by them, the question was, whether on these sales they were liable to pay the duties imposed by the 99th section upon "brokers, and *bankers doing business as brokers*," in *addition* to those imposed upon them as bankers?

The first paragraphs of the 79th section of the act of 1864, which concerns bankers as distinguished from brokers, is as follows:

"*Bankers* using or employing a capital not exceeding the sum of $50,000, shall pay $100 *for each license;* when using or employing a capital exceeding $50,000, for every additional $1000 in *excess* of $50,000, $2.

"Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be

paid or remitted upon draft, check, or order; or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes; or where stocks, bonds, bullion, bills of exchange, or promissory notes, are received for discount or sale, shall be regarded a *banker* under this act."

The 110th section prescribes the additional duties (beside the license tax) to be paid by "any person, bank, association, company, or corporation engaged in the business of banking."

The Circuit Court for New York, where the suit originated, was of opinion that "bankers" were not liable on such sales as those made in this case. The matter was now brought here by the government on error.

Mr. Speed, A. G., for the United States; Messrs. Allen, Burrill, and Evarts, contra.

Mr. Justice GRIER delivered the opinion of the court.

In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe "*or*" as meaning "*and*," and again "*and*" as meaning "*or*."

The purpose and intent of the legislature, in the amendment made to the ninth paragraph, was evidently not to change the correct definition given of the term "broker," and to make it mean that every man who sold his own stock was a broker, and liable to pay fifty dollars for a license. The obvious purpose of the amendment was to compel brokers to render an account of all sales made, whether for themselves or others, and to pay the duty on them. As is often the case in statutes, though the intention is clear, the words used to express it may be ill chosen.

The evil intended to be remedied by the amendment was transparent. If the amendment had been properly expressed, it should have been added as a proviso to the 99th section, which relates to the rates of duty to be paid on sales made in the stock-market by brokers or others licensed and

doing business as such, and in the preceding case the court have so construed it.

Now, a banker pays a much higher license tax than a broker, and is permitted to "prosecute or carry on" the business or profession of a broker without paying any further license; but if he prefers, he may not combine that business with his own. The 110th section prescribes the duties to be paid by a banker. It is not amended so as to require him to render an account of his purchases or sales of government stocks for himself. The case before us, therefore, presents no other question than the construction of the 99th section. It enacts that "all brokers and bankers doing business as brokers shall be subject to the following duties," &c.

Now, in order to subject a banker to the duties prescribed by this section, we are asked to interpolate the important word "*not*," and to construe it as including bankers who *do not*, as well as those who *do* transact "business as brokers." This would not be a construction of the statute, but an amendment thereof in direct contradiction of its language. This we do not feel at liberty to make.

JUDGMENT AFFIRMED.

GREEN *v.* VAN BUSKERK.

The ten days given by the 23d section of the Judiciary Act, to take a writ of error from this court, run from the day when judgment is entered in the court where the record remains; and when judgment is given in the highest court of a State on appeal or writ of error from an inferior one, and, on affirmance, the record is returned to such inferior court with order to enter judgment there, they run from the day when judgment is so there entered.

THIS was a motion made by Mr. A. J. Parker, in behalf of Green, plaintiff in error, for a supersedeas to stay execution upon a judgment of the Supreme Court of the State of New York.

It appeared that a judgment was entered by the Supreme Court in favor of Van Buskerk, the defendant in error here, which was affirmed in the Court of Appeals, *the highest court of law and equity of the State of New York*, on the 22d of December, 1865. Upon this affirmance the record was sent to the Supreme Court, with an order directing that court to enter judgment accordingly.

In pursuance of this order, judgment was entered in the Supreme Court, on the 16th of February, 1866, and on the 20th February a writ of error, which had been duly allowed, to this court, was lodged, together with the proper bond and all other papers in due form to stay proceedings, in the clerk's office of the Supreme Court of New York. On the 28th of February, 1866, the attorney for the plaintiffs below directed execution to issue upon the judgment; to prevent which the present motion for supersedeas was made.

The reader will remember, of course, that the Judiciary Act of 1789, by its 25th section, gives a right of re-examination by this court of the judgments of State courts, when "a *final* judgment or decree in any suit, in the *highest* court of law or equity in a State," involves certain questions, and the decision on them is given in a particular way: and will recall, further, that, by its 23d section, a writ of error is a supersedeas only where the writ is served by a copy thereof being lodged for the adverse party in the clerk's office, where *the record remains*, within *ten* days, Sundays exclusive, *after rendering the judgment or passing the decree complained of;* "until the expiration of which term of ten days," says the section, "executions shall not issue."

Mr. J. B. Gale, against the motion: A party's right to bring a State court judgment here depends upon the 25th section of the Judiciary Act; and that authorizes a review only of a judgment in the *highest court of a State* in which a decision could be had.

Now, in New York, the highest court of the State is confessedly the Court of Appeals; the Supreme Court, notwithstanding its title, being inferior to it. In this case, the

judgment "complained of" is the judgment of the Court of Appeals. That judgment was given on the 22d of December, 1865. No writ of error was lodged anywhere below until the 20th of February. Of course, it was not lodged within the ten days. The fact that the record may not "remain" in the court whose "judgment is complained of," does not alter the case.

It is almost unnecessary to say, that in contemplation of law the record passed instantly from the Court of Appeals, on judgment being given there, into the Supreme Court below. If, in point of fact, it was delayed *in transitu*, that gives no advantage to the defendant in it, as regards an appeal. He might, in point of fact, delay such transit himself.

The CHIEF JUSTICE delivered the opinion of the court.

We have already held, at this term, in a case from Massachusetts,* that when the Supreme Court renders final judgment, and sends the judgment to a court below for execution, and with the judgment the record, a writ of error to review the judgment may be issued to the latter court.

In that case, it is true, no question was made in respect to the operation of the writ as a supersedeas; but we think that the true construction of the act of Congress requires us to hold that a judgment cannot be regarded as final, in the sense of the act, until entered in a court from which execution can issue.

In the case now before us, the record was sent by the Court of Appeals to the Supreme Court, and the judgment was entered in the latter court in conformity with the direction of the former. This was, it is true, the judgment of the Court of Appeals as well as the judgment of the Supreme Court; but it became a final judgment, on which execution could issue only when entered, on the 16th February, 1866, in the Supreme Court, to which the record was returned, and where it remained.

* McGuire v. The Commonwealth. (Motions.) *Supra*, 382.

Syllabus.

The unsuccessful party had ten days from that entry to take out a writ of error and make it a supersedeas; and he duly availed himself of this right by service of the writ of error on the 20th February, 1866, and giving the required bonds.

The direction to issue execution was given under a mistaken construction of the act; and its issue makes it necessary that a writ to stay the proceedings be sent from this court.

MOTION ALLOWED.

THE SALLY MAGEE.

1. When a vessel is liable to confiscation, the first presumption is that the cargo is so as well.
2. The *primâ facie* legal effect of a bill of lading, as regards the consignee, is to vest the ownership of the goods consigned by it in him.
3. Ownership thus presumptively in an enemy is not disproved by a test affidavit in prize, stating generally that the goods consigned had been purchased for their consignee contrary to his instructions, and that he had rejected them; and that this appeared "from the correspondence of the parties," which the affiant (an asserted agent of the alleged true owner) swore that he "believed to be true," but which neither he nor any one produced, or accounted for the absence of; and where, though two years had passed between the date of the claim and that of the decree, the consignors and asserted owners, who lived at Rio Janeiro, had not manifested any interest in the result of the prize proceedings, which were at New York, nor, so far as appeared, had been even applied to in the matter.

   [N. B. The court, referring to *The Merrimack* and *The Frances* (8th Cranch, 317 and 354), admitted that the case would be different had the allegation as to purchase by the consignor, in contravention of orders and subsequent rejection by the consignee, been sufficiently proved; and proved affirmatively, as it was requisite to prove it.]

4. A lien on enemy's property, set up under the act of March 3, 1863, to protect the liens of loyal citizens upon vessels and other property which belonged to rebels, is not sufficiently proved by the test-oath of the party setting up the lien and asserting it without any specification as to date of origin, "from correspondence" with the parties and "copies of the invoice of the cargo" sworn to as "believed to be true;" the correspon-

dence and copies not being produced, nor their absence accounted for. The principles asserted in the preceding paragraph of the syllabus apply here.

5. Capture at sea of enemy's property clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage; and anything done thereafter, designed to incumber the property or to change its ownership, is a nullity.

6. Cases of prize are usually heard, in the first instance, upon the papers found on board the vessel, and the examinations taken *in preparatorio;* and it is in the discretion of the court thereupon to make, *sua sponte,* or not to make, an order for further proof. But the *claimant* may move for the order, and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered; and such an order may also be made in this court. The making of it anywhere is controlled by the circumstances of each case. It is made with caution, because of the temptation it holds out to fraud and perjury; and made only when the interests of justice clearly require it.

APPEAL from a decree of the District Court for the Southern District of New York, condemning as *enemy's property* the bark Sally Magee and her cargo, captured during the late rebellion; the question before this court being, however, only as to the cargo; the condemnation of the vessel not being appealed from. The case was thus:

Before the commencement of the rebellion, the vessel had been engaged in trade between Richmond and South America. Her outward voyages were usually to Rio Janeiro. She left Richmond upon her last voyage on the 2d of January, 1861—that is to say, about three months before the outbreak of our civil war*—with a cargo of flour and domestic goods, shipped by Edmund Davenport & Co., of Richmond, and consigned to Charles Coleman & Co., at Rio. She took in a return cargo of coffee and a small parcel of tapioca. Four bills of lading were given. Three of them were to Coleman & Co.; two for consignments to Davenport & Co.; the third for a consignment to Dunlap & Co. The other bill of lading was to Moore & Co., of Rio, and was for a consignment also to Dunlap & Co. *All the goods were to be delivered at Richmond.*

* The firing on Fort Sumter was upon the 12th April, 1861.

Statement of the case.

The vessel sailed from Rio for Richmond on the 12th of May, 1861. When forty-five days out from Rio, and before any intelligence of the war had reached her, she was captured as prize, and sent to New York, where both the vessel and cargo were libelled in the District Court. Upon the return of the monition, on the 23d of July, 1861, two claims, both made by Fry, Price & Co., of New York, were interposed relative to the cargo. In July, 1863—*two years after the proceedings on prize were instituted*—both the vessel and cargo were condemned, the latter having been appraised at the considerable sum of $69,000.

One of the claims made by Fry, Price & Co., was in behalf of Coleman & Co., and embraced that part of the cargo (1500 bags of coffee) which was consigned to Davenport & Co. It stated among other things that Coleman & Co., as factors and commission merchants, at Rio Janeiro, "had been directed to purchase and ship for the account, and to the consignment of Davenport & Co., coffee, if procurable, *at not over ten and a half cents a pound;* that Coleman & Co. did make the shipment of the cargo above claimed to the consignment of Davenport & Co., but that by the invoice thereof it appeared that the said purchase was not made at or within the said limit; for which cause, Davenport & Co. had refused to receive it as purchased for their account, or otherwise than on the account of the shippers, Coleman & Co., and as agents of necessity for them; and that the said Davenport & Co. had authorized Fry, Price & Co. to receive the same in their place and behalf as aforesaid."

The claim was supported by the affidavit of Mr. Price of this firm. It alleged "that the facts above stated" were stated "from the correspondence of the parties, which he believes to be true." *None of the papers referred to were put in evidence by annexing them to the affidavit or otherwise.*

The other claim related to the residue of the cargo—about 2000 bags of coffee—consigned to Dunlap & Co., of Richmond. It was not denied that this was enemy's property. The claimants alleged, however, *a lien.* Their claim

stated that Dunlap & Co. owed them a balance of $35,326, and upwards, and "that they were authorized and directed by that firm to receive and sell the coffee, and apply the proceeds, as far as necessary, to the payment of the debt, and to hold the balance for the account of the debtor firm." Like the first claim, this one was supported by the affidavit of Mr. Price, who swore that he stated the above facts "*from correspondence with the firm of Dunlap & Co., and copies of the invoices of the cargo, and believed the same to be true.*" But as in the case of the preceding claim, *neither correspondence nor copies were produced.*

It is necessary here to say that, by act of Congress of March 3, 1863,* "to protect the liens upon vessels in certain cases, and for other purposes," it is provided, that where any vessel or other property shall be condemned in proceedings authorized by certain preceding acts (against rebels), the court making the decree of condemnation shall, *after condemnation* and before awarding the distribution of the proceeds of confiscated property, provide for the payment out of the proceeds, of any *bonâ fide* claims by any loyal citizens intervening in the prize proceedings, which shall be duly established by evidence.

Mr. Lord, for the claimants: The vessel having been captured before any intelligence of our civil war begun had reached her, the question of intent to break the blockade of our Southern coast—so usual a question of late in the court—does not arise.

The question, as to the claim set up for Coleman & Co., is one of enemy's property purely; and as to the other, a question of the protection, under the statute of March 3, 1863, of a *lien* held by loyal citizens of New York. In both cases we suppose that the *onus probandi* is with the captors.†

I. *As respects the claim in behalf of Coleman & Co.*

The question is one simply, as we have said, of the enemy

* 12 Stat. at Large, 762; referring to certain prior acts.

† The ship Resolution, 2 Dallas, 22.

status of the claimant; a proprietary question, whether at the time of capture the cargo was the property of neutral or of enemy? Now,

1. A foreign correspondent making a shipment on the order of his principal, but without the limits of the order, does not vest the property in the principal without some act of adoption, or waiver by him. Here there was none.

The doctrine has been uniform in the prize courts, that although goods are ordered by a correspondent, yet if they are subject to rejection by the principal, the property does not pass unless accepted. Several cases to this effect—the *Merrimack* and others—may be seen in 8th Cranch.*

In *The Frances*,† one of them, a British agent in Great Britain, in orders given before the war to purchase goods for the claimants, an American house in New York, made purchases, but deviated from the orders. He said: "I have exceeded in some articles, and have sent you others not ordered. I leave it with yourselves to take the whole of the two shipments, or none at all, as you please." The bill of lading and invoice were expressed to be on account of *the American consignees*. Marshall, C. J., speaking of the consignment in excess of orders, says:

"This, then, is a new proposition, on which the American correspondents are at liberty to exercise their discretion. They may accept or reject it, and until they do accept it, the property must remain in the enemy shipper."

So here it remained in the Brazilian shipper until the deviation from orders should have been accepted or waived.

2. The claim and test affidavit were sufficient. The claimants at Rio could not be expected to verify the claim personally; the verification by an agent is all that can be asked. The Richmond consignees, from living in Virginia, could not be expected to make the verification. The devolution of the rejected purchase to a competent agent, is in all respects proper, and the only way the claim could be put in.

* Pages 317, 325, 328, 354. † Ib. 354.

The test affidavit with the claim is sufficient. The office of the test affidavit is not to supply the details of evidence, but to aver the simple fact of proprietary interest. The oath annexed is as efficient as any detail of circumstances or correspondence. An order for further proof is made by the court *ex motu suo* only. It was not competent to the claimant to apply for it. The affidavit is always the summary proof, and, until impeached by further proof, is decisive in prize proceedings.

There is no ground to doubt the truth of the affidavit, by reason of any want of statement in the bills of lading or papers, that the property is neutral. At the time of the last communication to Rio from the United States there was no war, blockade, or contraband, which the ship's papers could refer to. Nor could the correspondence between the parties embrace any letters from the consignees respecting this shipment. There is no ground of any suspicion of suppression or unfairness as to documents; and on the claim, not impeached, and on the ship's papers, the coffee of Coleman & Co. should not have been condemned, but restored to the claimants.

The decree of condemnation precluded all claim to offer further proof. Until the decree, no further proof could be admitted, even if the matters alleged were material, or were capable of an explanation consistent with the right to restoration.

II. *As to the claim of Fry, Price & Co., as lien creditors of Dunlap & Co.*

By the doctrines of prize, a creditor having a mere lien, not being a direct proprietary interest accompanied with possession, cannot be heard in a prize proceeding. Whatever be his right, the captured property must be condemned. But the act of March, 1863, introduces certain new and benignant, though just features into the code of prize.

It is submitted that this act should be largely construed in favor of creditors. Also, that no condemnation creates any rights to interfere with the payment of any debts which

could be specifically enforced. It overrides condemnations, and has the operation of an actual amnesty as to honest creditors. The cases, indeed, were innumerable where property became subject to condemnation during the rebellion, which to have swept from honest creditors would have been most unjust and cruel; and the principle, the spirit of the act in all particulars, is as applicable, notwithstanding its precise language, to prize condemnations as to any others.

Mr. Speed, A. G., and Mr. Coffey, contra.

Mr. Justice SWAYNE delivered the opinion of the court.*

When a vessel is liable to confiscation, the first presumption is that the cargo is in the same situation.† The bills of lading in the case are in evidence. The goods were consigned to parties living in Richmond. This vested the ownership in them. Such is the legal effect of a bill of lading as regards the consignee, unless the contrary is shown by the bill of lading itself or by extrinsic evidence.‡ Upon the proofs there was clearly a *primâ facie* case for the condemnation of the entire cargo.

We will consider, first, the claim in behalf of Coleman & Co.

In our opinion the law was correctly laid down by the counsel of the appellants. If the facts alleged are made out by the proofs, the claimants are entitled to restitution. The cases referred to in 8th Cranch are in point, and are decisive upon the subject. General principles, in the absence of these authorities, would have led us to the same conclusion. When an agent exceeds his authority, the principal is not bound unless he ratifies. Upon being informed he must exercise his election. Whatever may be the motives of his decision, the result is the same. His acceptance or rejection determines his rights and obligations.

Here, if Coleman & Co., as factors, bought the coffee at a

* Nelson, J., not having sat; having been indisposed.

† 2 Wheaton, Appendix, 24.

‡ Laurence v. Minturn, 17 Howard, 100.

price exceeding the limit prescribed by Davenport & Co., and the latter, upon learning the fact—no matter when that was, or what the circumstances—repudiated the purchase, the title of the factors thereupon became absolute, and none passed to the principals for whom the purchase was made.

It remains to consider how far the facts alleged by the claimants are sustained by their proofs. The burden of the affirmative rests upon them. The language of the test affidavit implies clearly that the correspondence to which it refers was in their possession. It is not produced, and its absence is not accounted for. The court is asked to take the averment of the affiant as to its existence and construction, in place of the correspondence itself. This no sound system of jurisprudence would tolerate. If the correspondence was not in the possession of the claimants, doubtless that and other evidence was at the command of Davenport & Co.

Between the filing of the claim and the time when the decree was rendered more than two years elapsed. There was time to communicate repeatedly with Rio. Coleman & Co. could have furnished full testimony. If the facts were as alleged it would have been conclusive in their favor. Nothing is produced from them. It does not appear they were applied to, nor does it appear—large as is the amount involved—that they have done any act, or manifested any interest touching the controversy since it began. We can draw but one inference from these facts. It is, that if the evidence were produced, it would be fatal to the claim.

The appellants insist that an order of the court, made *sua sponte*, after the hearing upon the preparatory evidence, was indispensable to enable them to introduce any additional testimony; that it was not competent for them to apply for such an order; and that none having been made, the test affidavit should have been held sufficient. Such is not the rule as to further proof. If it were, the claimants would not be excused for withholding the correspondence, or not accounting for its absence when the test affidavit was submitted.

Cases of prize are usually heard, in the first instance, upon

the papers found on board the vessel, and the examinations taken *in preparatorio;* and it is in the discretion of the court thereupon to make or not to make the order. But the claimant may move for the order, and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered. Such an order may also be made in this court. In one case affidavits were submitted in support of the application, and the order was made after the cause was heard.* In another case a parol statement was submitted by the counsel for the claimant before the hearing, and the consequences were the same.† The result is always in the discretion of the court, and that discretion is controlled by the circumstances of each case. The order is made with great caution, because of the temptation it holds out to fraud and perjury. It is made only when the interests of justice clearly require it. In the case before us no application was made in the court below, and none in this court.

If it be said the court erred in not making the order without an application, and without a showing, we cannot assent to the proposition. The state of the evidence warranted the decree; and, as the case was presented, there was no reason to believe that further evidence would benefit the claimants.

The other claim relates to the coffee consigned to Dunlap & Co., of Richmond, and it is not denied that this was enemy property. The claimants allege a lien. The claim states that Dunlap & Co. owed them a balance of upwards of $35,826, and that they were authorized and directed by that firm to receive and sell the coffee, and apply the proceeds, as far as necessary, to the payment of the debt, and to hold the balance for the account of the debtor firm.

The same affiant made the test affidavit, as in the other case. He referred, as in that case, to an important correspondence, and failed to produce it. The same remarks apply upon the subject. It is to be inferred, also, that the

* Wheaton on Captures, 284–5.

† The London Packet, 2 Wheaton, 372.

letters were written after the shipment of the cargo, and, indeed, after the capture. In either case the arrangement was made too late to have any effect.

The ownership of property in such cases cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter, designed to incumber the property, or change its ownership, is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought. It strikes us as a scheme devised under pressure, to save, if possible, something from the vortex which it was foreseen inevitably awaited the vessel and cargo.

The claimants invoke the aid of the act of March 3, 1863. It cannot avail them. The facts relied upon as fundamental to the claim are not established to our satisfaction. It is, therefore, unnecessary to consider the subject of the proper construction of the act, or the effect of the facts, if they had been sufficiently proved.

DECREE AFFIRMED.

SIMPSON & Co. v. DALL.

1. Where a bill of exceptions at all fairly discloses the fact that the exceptions were made in proper time, this court will not allow the right of review by it to be defeated because the bill uses words in the present tense, when the true expression of the court's meaning required the use of the past one; nor because the bill is unskilfully drawn, and justly open, philologically, to censure.
2. A party offering secondary evidence of the contents of papers must show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him: *Hence*, Where certain original letters had been passing between two attorneys

in a case, and one of the attorneys testified that he had looked over his papers for all such documents as related to the case, and that the needed letters were not among them; that he recollected thinking about the letters at the time he was looking over his papers, but (being under the impression that he had left them with his colleague) did not make "any special search for them."

And where the other attorney testified that he *had* had the letters, but was under the impression that he had returned them to the first attorney; that he had not examined his *files* of letters, and, not finding his letters among the other papers in his possession, supposed that the first attorney had them.

Held, that the secondary evidence of the contents of the letters was wrongly given: the court assuming of course that the search was insufficient.

8. Where a solvent firm owing *bonâ fide* a debt, learns—though by irregular and perhaps improper means on the part of one of their number—that the debt is about to be attached by a creditor of the person to whom they owe it, they may nevertheless pay the debt as soon as they please and in such securities, including their own negotiable note, as their creditor is willing to accept; and if the debt is actually paid, and so acknowledged by their creditor to be, the creditor of such creditor cannot make them pay it over again to *him*; though his attachment may thus have been provokingly defeated. Neither is there anything in the laws of Tennessee relating to the attachment of debts due by non-residents that militates with this doctrine that a solvent man may at any time pay his just debts not attached by lawful process.

DUNHAM & KEARFOOT, of Baltimore, were indebted on two notes, amounting to about $3000, to Dall, Gibbons & Co. of the same place, but were insolvent and did not pay. In this condition of things, Dall, Gibbons & Co. hearing that a house in Rogersville, Tennessee (Simpson, Duff & Co.), which was solvent, owed money to the insolvent debtors just named, at Baltimore, set themselves at work to get payment, by attachment, from *it*. Addressing his letter to Rogersville, Tennessee, Mr. Cocke, their attorney in Baltimore, accordingly wrote—first on the 16th of March, 1858, and then on the 17th—to a cousin of his, Mr. Jones, a professional gentleman, who *had* been residing at Rogersville, but who was now in Florence, Alabama, a place three or four hundred miles away; from which place, however, it seemed that he was ready to return when any business worthy of so long a journey made it worth his while to do so; Mr. Cocke, who wrote the letters, being a member of the law firm of G. W.

Howard & Co., at Baltimore, and the letters having been put under an envelope stamped externally with the business card of that partnership. Cocke was, moreover, a cousin of *Mr. Simpson's* wife. The letters were of such a character that Mr. Jones "might have felt authorized, if not directed, to consult Simpson & Co., whose debt he was requested to attach, in relation to the business."

On what exact day these letters reached the Rogersville post-office did not appear. The regular course of the mail would have brought them there about the 19th or 20th of March; but if they happened to drop into a distributing-office by the way—"a thing which very often happened"—they would have been delayed till the 21st or 22d. There was, of course, also, the ordinary chance of other accidents. When they did arrive, however, at Rogersville, they were put, as it turned out, into the post-office box of this very firm of Simpson, Duff & Co. From the post-office the letters went to the counting-house of this firm. Here Mr. Duff, a member of the firm, opened and read them; and perceiving their contents, *mentioned the fact of his having opened them and of what was in them to his partner Simpson*, the senior and active partner of his firm. He then *re*-sealed them, and in a letter post-marked the 29th March, though dated the 27th, transmitted them in a friendly letter to Mr. Jones, at Florence; *not telling him, however, that he had opened the letters or was possessed of their contents.*

On the receipt of the letters, which got to Florence on the 1st of April, Jones came hastening up to Rogersville, getting there, perhaps, on the 4th. In the meantime, however, the Baltimore creditors having heard that Mr. Jones no longer resided at Rogersville, wrote, on the 25th of March, to another lawyer there, Colonel McKinney, placing the matter in *his* charge, and directing him to get the letters from the Rogersville post-office. Going to the post-office, he learned that the letters had been put into Simpson, Duff & Co.'s box. Following the matter up to Duff, he was told on the 29th that the letters had been forwarded to Mr. Jones, at Florence, "several days before." He then in-

quired of Simpson as to the state of their account with Dunham & Kearfoot, the insolvent firm at Baltimore; a matter which Simpson "did not know about exactly,"—"would look at his books for,"—inviting Colonel McKinney "to call the next day." On the next day Colonel McKinney called, and learned that, on the 26th preceding, they had remitted $2000 of their debt to their creditor house at Baltimore. They still owed, apparently, about $3100. On the 7th of April an attachment was issued; but it was too late to profit the persons for whom it was issued; for, on the 1*st* April preceding, Simpson & Co. had remitted the whole balance to their creditors at Baltimore; sending various negotiable notes for $1600 of it, and their *own* negotiable note for the remaining $1500. A receipt was returned on the 5th; two days, of course, before the attachment issued.

In the meantime, and perhaps, as already said, about the 4th April, Mr. Jones presented himself at Rogersville. The first thing he did was to go to Simpson, Duff & Co., to consult with them about their debt, which he had been requested to attach. He showed to Mr. Simpson the two letters which he had received, and "asked Simpson's counsel in the premises." Simpson, without informing him that he was already apprised of what the letters contained, informed him that the claim had been "turned over" to another attorney, Colonel McKinney, who was now "trying to get an attachment on the amount his firm might owe Dunham & Kearfoot;" and informed him also of the fact, more important to his principals, that the debt had all been paid. Mr. Simpson added, that he had felt himself under special obligation to pay the debt, as Dunham & Kearfoot had been good friends of his firm; that he had been repeatedly written to by them to pay up the amount due; that he had been trying to get exchange; that he had been waiting till the return of a certain debtor, whom he named; and for the payment of some other debts, so as to get exchange cheaper; and "that he *hoped* the attachment of McKinney would not catch what he had sent on to Baltimore."

Jones finding out otherwise that his letters had been

opened, *re*-sealed, and that he had not been told of this, and apparently put out at losing a piece of business that might have been remunerative, declared himself "astonished." And the Baltimore firm of Dall, Gibbons & Co., conceiving that they had lost their debt wholly from Duff's having got possession of the letters, and in consequence of the knowledge which he had acquired by opening and reading what was not intended for him, now sued *his* firm, Simpson, Duff & Co., of Rogersville.

The declaration set out the existence of the debt, the writing of the two letters, that Duff, a member of the firm, "took the same from the post-office without any authority for so doing, and opened and read them, and had thus illegally, wrongfully, and fraudulently acquired a knowledge of their contents, and *communicated the same to the other members of his firm.*" And it averred, that after the firm had in this way obtained information of the intention of Dall, Gibbons & Co. to attach the debt, the said Simpson, Duff & Co. wrongfully, illegally, and fraudulently *detained* the letters aforesaid, and illegally and fraudulently failed, for eight days, to forward or to deliver the same to the said Jones; with the purpose, design, and intention of preventing them, the plaintiffs, from obtaining payment of the notes due them, and for the purpose of favoring Dunham & Kearfoot aforesaid. By means of which tortious act and several grievances, and by reason of the insolvency and bankruptcy of the said Dunham & Kearfoot, which occurred soon after, they, the plaintiffs, had lost the whole amount of their debt.

Mr. Duff, however, for himself and his firm, had also an account to give of the transaction. This account appeared partially in the testimony of Mr. Cocke, the attorney in Baltimore, who had written and sent the letters, partially in the testimony of Mr. Jones himself, and partially in a letter of Duff's own, written in reply to one which Mr. Jones had written to *him*, complaining of what Duff had done about the letters, and which letter of Duff's, in vindication of himself, Jones had made evidence by referring to.

Mr. Cocke, the attorney, stated that the claim had been sent to Mr. Jones, "*because* his intimacy and relationship with Simpson, Duff & Co. would enable him to *ascertain from them* the amount of *their* indebtedness to Dunham & Kearfoot."

Mr. Jones gave more full particulars. He testified that before studying law he had been a clerk in the house of this same Simpson, Duff & Co.; that Simpson had married his first cousin, and that he and Duff had "always, for years, been upon the most intimate terms of friendship;"—one evidence of which he signalized in the fact mentioned by him, that while he was at college "he had carried on a correspondence with a young lady through the defendant Duff, and had *authorized Duff to read his letters before giving them to the young lady.*" He mentioned, also, the fact, that after the occurrence about the letters, he, Jones—as yet knowing nothing about it—had seen Duff constantly, and "for a part of the time slept with him at night." He stated, also, that Duff had "for years been authorized to take his letters out of the post-office at Rogersville, and to forward them to him when absent;" though he declared solemnly that he had "*never authorized him to open his business letters* during his absence."

The postmaster, too, of Rogersville, testified that it was his general practice, and had been for years, to put Mr. Jones's letters into the box of Simpson, Duff & Co.; that Duff boarded with him, the postmaster; and Jones himself testified, that had he been in Rogersville when the letters came, he *would* have gone directly to Mr. Simpson and told him about them; adding, "I *think* this from my intimacy with him, and from some directions to that effect in the letters themselves."

The letter of Duff to his friend of so many years was thus, in substance and material parts, expressed:

ROGERSVILLE, 8th July, 1859.

DEAR JONES:

Yours is to hand; and but for my absence from home, at the time of its arrival, should have had an earlier notice. I have

only to say, it is true I opened the letter referred to. In so doing I was actuated by none other than pure motives. The letter was from a place I believe you had no private correspondence with, and at the time, it occurred to my mind that it might be a business letter, and one that demanded prompt and immediate attention. This was the only reason I had for the act. Owing to the very friendly relations that had always existed between us, and feeling a lively interest in your welfare, I thought I might safely take this liberty, and in taking it I was prompted alone by the feeling of doing what I supposed would be of service to you in your absence. When I found that the letter was connected with *our* business, I mentioned it to Colonel Simpson, your relation, and my partner, who expressed himself very sorry that it had been opened. I then resealed and forwarded it to you at once. If *I committed an error, it was in not then informing you what I had done; this, however, was an error of omission only.* Before opening the letter, I had no knowledge or intimation of its contents. You say you are "astonished" at it. I am surprised that you should express astonishment, in view of our long intimacy, and in view of the fact that I have for so many years taken out your letters from the post-office at your request, and forwarded them to you, when you were absent from Rogersville, as you were when I opened the letter. I sincerely thought I was doing right, and for the promotion of your interest. It distresses me to learn, from the disapprobation implied in your letter, that you condemn an act, which, had it been done by yourself under similar circumstances, I would not have censured. The fact that I opened the letter, did you, I trust, no harm, nor your client. I forwarded it at once, on finding, as I did, most unexpectedly, that the letter contained claims sent out in behalf of Dall, Gibbons & Co., against Dunham & Kearfoot, which they desired to secure by attaching a debt due from us to the house last named. When I first saw the letters, I did not know how long they had been in the store—and seeing two letters with the name of G. W. Howard & Co. stamped on the envelopes, it occurred to me that they were business letters of importance, and required immediate attention; knowing that Howard & Co. did a considerable business in this section of the country, and not for one moment supposing that the business could have any connection with our house, as we at the time did not owe them anything. I knew, also, that Mr

Cocke, a member of the firm of G. W. Howard & Co., was a relation of yours, and it was natural for me to suppose that business from them would be placed in your hands, when they needed an agent at this point.

I have reason to believe that Dall, Gibbons & Co., hearing that you had removed to Alabama, engaged the services of Colonel McKinney, and that he was at Knoxville, endeavoring to obtain an injunction as you came up from Alabama with the claims. If the business was transferred into his hands before you reached Rogersville, and when, as a citizen of Florence, you could not be expected to attend to it, I am really at a loss to perceive how my intended kindness can have operated to your prejudice, as we were making arrangements, and using every effort to settle our indebtedness to Dunham & Kearfoot, before we had any intimation of Dall, Gibbons & Co.'s claims. I repeat, however, that I am sorry this thing has occurred, and hope that this explanation will prove satisfactory, and that our former friendship may still remain unchanged. I trust I shall hear from you soon.

Your friend, truly,

J. M. DUFF.

To sustain the plaintiff's case it was necessary, of course, to prove that the two letters had been written. Mr. Jones proved that he had received two letters inclosing the notes; describing the letters. The record then went on in substance thus:

"On the witness being asked to produce the letters, he stated that when he left Florence, a few days before this trial—for the purpose of attending as a witness—he *looked over* his papers for all such documents as related to this case. The letters were not among his papers. The witness recollects thinking about the two letters during the time he was looking over his papers; but being under the impression, that when the declaration was filed in this case, he had left them with J. R. Cocke, the plaintiffs' attorney, he did not make any special search for them more than for the other documents.

"The attorney, Cocke, being then introduced by plaintiff, testified that he *had* had the letters in his possession, while he was drawing the declaration in this case, but was under impression

that he had returned them to Jones. The witness had *not** examined his files of letters before the commencement of this term of the court, in getting his papers together for the trial, and had not found said letters; and not finding them among *the other* papers in his possession, he had supposed the witness Jones had them.

"Upon this testimony the court permitted Mr. Jones to go on and testify as to his recollection of the contents of the letters; to which action of the court, in allowing secondary evidence while the existence of better evidence was shown, the defendants *except*.† The witness Jones *then* went on to testify that one of the letters was dated Baltimore, 16th March, 1858, and the other, Baltimore, 17th March, 1858; that one of them contained two notes, drawn by the firm of Dunham & Kearfoot, *dates and amounts not recollected;* that one of the notes was due at the time it was sent to witness; that the other note was not due, but would shortly fall due. In one of the letters there was a statement of the amount due from Dunham & Kearfoot to the plaintiffs, Dall, Gibbons & Co. But the *amounts and particulars of that statement the witness was unable to remember.*"

By the statutes of Tennessee, it should here be said, the property *in* Tennessee, of debtors non-resident within the State, is allowed to be attached only when such "non-resident debtor shall be removing, or about to remove, his property beyond the limits of the State."‡

The record went on in substance thus:

"The court, among other *things not excepted to*, charged the jury in effect, as respects material parts, as follows:

"1st. That this debt was property within the meaning of the statutes of Tennessee; and that if the defendants were about to remove their property beyond the limits of the State, the plaintiffs would have had the right to attach it; that if the defendants, by arrangement with insolvent creditors, intended to pay portions of their debts, and convert other parts into negotiable securities, so as to defeat the power of the plaintiffs to collect their debts from such insolvent non-resident creditors, who were

* *Sic*, in the printed record.

† *Sic*, *i. e.* in the present tense, in the printed record.

‡ Sessions Acts of 1855–6.

plaintiffs' debtors, such conduct would amount to a removal of the property from the limits of the State, and if such measures were in contemplation, the plaintiffs would have the right to attach such indebtedness, to prevent its removal and secure their debt.

"2d. That authority to forward a letter is not an authority to break it open; that if, even with good motives, the defendants broke open the plaintiffs' letter to their attorney without authority, it was a violation of the legal rights of plaintiffs.

"3d. That if the defendants detained the letters thus broken open, with the view and purpose (as charged in the declaration) to enable them to use the information so illegally obtained, and pay the debt and convert it into negotiated securities, before the plaintiffs could issue their attachment and secure their debt, such detention, with such motives, was an illegal, wrongful, and fraudulent violation of the rights of the plaintiffs, for which a right of action exists.

"4th. That in the event of the jury finding that the plaintiffs lost their debts by reason of the fraudulent conduct of the defendants, as above stated, and the insolvency of Dunham & Kearfoot, they would be entitled to recover the amount of their debts, such debts being not more than the amount due from Simpson, Duff & Co.

"5th. That all the partners who knew how the information was illegally and wrongfully obtained, and concurred in the subsequent acts to defeat the plaintiffs' attachment by payment to the insolvent debtors, were liable for the damages, and none but those who did."

A motion was afterwards made for a new trial, and the record went on in these words:

"The court overruled the motion for a new trial; *to all which action of the court the defendants except, and tender this their bill of exceptions, which is signed and sealed by the court*, and ordered to be made a part of the record in this case."

The case was now here on error: *Mr. Maynard, for the plaintiff in error, contending:*

1. That secondary evidence of the contents of the letters had been improperly received; there having, as he argued, been no sufficient proof of search for the originals.

2. That the charge was wrong; and that Simpson, Duff &

Co. were under no obligation to withhold from their creditor a debt which they justly owed him, and which he was pressing for, merely because they had accidentally become possessed of intelligence that somebody else wanted it held back for *their* benefit. Suppose they had accidentally or even designedly overheard a conversation instead of seeing a letter. Does any one think that in law they would have been bound to hold back payment?

Mr. Browning, contra:

1. Before passing to either of the objections, we note that no errors are assigned on this record. The plaintiffs in error say in this bill that they "*except*" to the decision of the court admitting secondary evidence of the contents of the letters; but it does not appear that any exception was taken when the decision was made and the trial was in progress. On the contrary, exception seems to have been first tendered after the motion for a new trial was overruled. Exception so taken cannot be availed of here. It is a well-settled principle that no bill of exceptions is valid which is not for matter excepted to at the trial. The original authority under which bills of exception are allowed, has always been considered to be restricted to matters of exception taken pending the trial and ascertained before the verdict. It need not be drawn out and signed before the jury retire; but it must be taken in open court, and must appear by the certificate of the judge, who authenticates it, to have been so taken. This was fully admitted in *Hutchins* v. *King*,* where the rule was only not insisted on through a clerical mistake. Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice. For if it be brought to the attention of the court that one of the parties excepts to his opinion, the judge has an opportunity of reconsidering or explaining it more fully to the jury.

2. The counsel for plaintiffs in error has raised a question upon the ruling of the court in admitting secondary evidence of the contents of two letters.

* 1 Wallace, 60.

No general rule can be laid down upon this subject applicable alike to all cases. The proof necessary to establish the loss of a writing, so as to let in secondary evidence of its contents, must depend upon the nature of the transaction to which it relates, its apparent value, and other circumstances. If suspicion hangs over it, and there is any reason to believe that it is designedly withheld, a rigid inquiry should be made into the reason of its non-production; but if there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original—in respect to which the courts extend great liberality.* In this case, the search for the originals might have been more thorough and rigid; but reasonable diligence was used, and there is no reason to suspect they were intentionally withheld.

But however this may be, the evidence of their contents was given to the jury without objection, and the question of its admissibility cannot now be raised here.

3. Objection is made to the charge of the court. Is the charge really open to censure?

Mr. Jones testifies that he never gave Duff authority to open his business letters. There is no evidence that Duff had such authority. What a college boy chose or did not choose to do a half century perhaps ago, and on one of those occasions when it is not given to men to be wise, is a small affair; of no pertinence to the case. If certain letters were submitted to him open, it does not follow that he had a right to break open others not submitted. No purpose that Duff in his letter states as having animated him was to be answered by opening and reading the letters instead of forwarding them. He saw the card of Howard & Co. on them, and could have replied to them that the letters were forwarded. He pretends to wish to serve his friend, and does it by depriving him as fast as possible of a valuable piece of business.

But the gravamen of our charge is less here than in that

* Williams v. United States, 1 Howard, 299; De Lane et als. v. Moore et als., 14 Id. 265; Juzan et als. v. Toulmin et als., 9 Alabama, 663; Jones et als. v. Scott, 2 Id. 61.

Duff communicated his irregularly obtained knowledge to Simpson, the leading and senior member of his firm. He had assuredly no authority to do *that*. Duff's duty, when becoming accidentally possessed of information not intended for him, was to forward the letters as fast as possible, with an explanation to Mr. Jones, and to keep profound silence as to everybody else. If under those circumstances Simpson, or the firm generally, had gone on to pay the debt before an attachment bound it, we might, perhaps, have less to say. But here the debt was discharged in the way that it was, and with the haste that it was, obviously, in consequence of the information given by Duff to his copartner. Dates show this. Mr. Simpson is "very sorry" to hear that the letters had been opened, and shows his extreme sorrow by profiting as fast as possible of the knowledge that through their being opened he had acquired. He went to work immediately to defeat the attachment; sending all the cash and drafts that he had, and then to make short, clear, clean, and conclusive work of it, the firm's own *negotiable* note for a balance that he could not pay in cash. The note did not *pay* the debt; and the only purpose of sending it was to put the debt in a form not susceptible of being attached.

As matter of fact, there is no doubt at all that it was in consequence of Duff's opening and reading of the letter, and *consequent communication of its contents to Mr. Simpson*, that our claim was lost.

Mr. Jones's statement of what he might, could, or would have done, *if* he had been at Rogersville—he not having been there—is of no value. It is based on a hypothesis non-existent, and is more than any man ought, perhaps, to state on his oath. In fact, Jones says that he only "thinks this." Certainly, as a professional man, it would have been the least prudent thing that he could have done. It is not to be presumed of him that he would have so acted.

The instructions of the court, then, were substantially right. Taken as a whole, they presented the case fairly on both sides, and could not have misled the jury as to the

issues they were to try, or the principles by which they were to be governed.

But it is a sufficient answer to say that no exception was taken to them when given, and that, therefore, this court will not review them.

Reply to the first point. The bill of exceptions, we may admit, is not well drawn; but it is plain enough that the exception was taken *before* the witness was examined. It says, indeed, that the plaintiffs "except" to the action of the court in allowing the secondary evidence. But it proceeds straight to add, "the witness, Jones, *then* went on to testify;" showing that the exception was taken before the testimony was given; and that though, in a present tense, the term relates to a past transaction. All that this court cares for is the fact; if it was properly taken, the omission to state it in the best way is not important.*

Mr. Justice DAVIS delivered the opinion of the court.

It is contended by the defendants in error that the rulings of the Circuit Court, which are alleged to be erroneous, were not saved during the progress of the trial, and cannot, therefore, be investigated here. If this was so, it would be fatal; but we do not *thus* interpret the record. It is well settled that bills of exception are restricted to matter which occurred during the progress of the trial; but it is not necessary, neither is it the practice, to reduce to form every exception as it is taken, and before the trial is at an end. It will do for the judge to note them as they occur, and after the trial is over, if it is desirable to preserve them, they can be properly embodied in a bill of exceptions. In this case the bill of exceptions is unskilfully drawn, and is justly subject to criticism; but it clearly enough appears that the rulings of the Circuit Court, which are sought to be reviewed here, were excepted to in proper time, and when the cause was on trial, and not afterwards.

* Hutchins v. King, 1 Wallace, 60.

If this is so, we cannot allow a valuable right to be defeated, because the judge carelessly used a word in the present tense, when the true expression of his meaning required the use of a word in the past tense.

It is a fair inference from the bill of exceptions that the defendants excepted to the introduction of secondary evidence of the contents of certain letters, when the court decided to admit it; and it is an equal inference that they also excepted, before the jury retired from the bar, to each of the series of instructions which the court gave to the jury. The bill of exceptions is, therefore, valid, and brings to our notice the proceedings of the Circuit Court, which, it is asserted, are erroneous.

The theory of this action is, that the defendants in error, who resided in Baltimore, Maryland, in March, 1858, addressed two letters to Jones, an attorney-at-law, in Rogersville, Tennessee, which, in his absence, were opened and read by Duff, one of the plaintiffs in error, and their contents communicated to his copartners, and then were detained for the purpose of obstructing the defendants in error in the prosecution of an attachment suit against the indebtedness which the plaintiffs in error owed to Dunham & Kearfoot, a mercantile firm, also resident in Baltimore. These letters were not produced on the trial, and the court permitted Jones to testify as to his recollection of their contents. This action of the court was excepted to, because no sufficient evidence of their loss had been made to justify it. The best evidence in the power of the parties must always be furnished, and the court was not authorized to allow secondary evidence of the contents of these letters to go to the jury, unless it was shown that they were either lost or destroyed.

The well-settled rules of evidence require this, and the danger of departing from them is well illustrated in this case; for on the important point of the dates and amount of the notes the testimony of the witness was imperfect, and wanting in clearness and precision. In order to show the

loss of the letters, it was necessary to prove that a diligent search had been made for them where they were most likely to be found. There is no general rule as to the degree of diligence in making the search; but the party alleging the loss is expected to show "that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him."*

In the case before us this plain rule of evidence was palpably violated; for there was no diligence whatever used to obtain the letters, and no such search as would justify the court in inferring that they were lost.

J. R. Cocke, the attorney, went to the place of trial, under the belief that Jones, who was to be a witness, had the letters and would bring them. Jones was in the same category. Neither had made any special search for them, for each rested in the conviction that the other was the custodian of them. It was a case of pure negligence, and should have been so treated by the court. To approve the ruling of the court would justify the admission of secondary evidence on the merest pretence, and would do away entirely with the necessity of producing primary evidence. We cannot countenance a practice so loose, and such a manifest departure from the plainest legal principles.

The decision on this point remits the cause to the Circuit Court; but as it may be tried again, we are called upon to go further and decide the merits of this controversy, as they are involved in the instructions which the court gave to the jury.

Among other things, the court substantially charged the jury, that if Simpson, Duff & Co. were about to remove their property beyond the limits of the State, Dall, Gibbon & Co. would have the right to attach it, and that they could not pay their debt to Dunham and Kearfoot, who were insolvent,

* 1 Greenleaf on Evidence, § 558.

so as to defeat the measures which Dall, Gibbon & Co. had in contemplation to prevent it. Such a doctrine as this would effectually destroy credit and commerce.

If Simpson, Duff & Co. were indebted to Dunham & Kearfoot, they surely had a right to pay them, and the court will not inquire into the motive which prompted the payment. But the motive was meritorious, for the law does not favor a partial appropriation of an insolvent debtor's effects, but prefers an equal and general distribution. When the debt was contracted in Baltimore, both parties contemplated that, in the usual course of dealing, remittances or negotiable securities would be sent from Tennessee to discharge it, and it would be singular if the fact that *Simpson, Duff & Co.* were about to remove *their* property from Tennessee, in order to comply with their agreement, should authorize the issue of an attachment.

The mere statement of the proposition is enough to show its fallacy. Dall, Gibbon & Co. had no claim against Simpson, Duff & Co. The relation of debtor and creditor did not subsist between them, and we cannot see why it was necessary for these last to procure the consent of Dall, Gibbon & Co. before they could send money and negotiable notes to pay in good faith an honest debt, due to a mercantile firm residing in Baltimore, which was contracted there, and in the usual course of trade must be paid there.

But it is necessary to discuss the evidence in the case, as the charge of the court assumed that there was a cause of action. Duff and Jones were intimate friends, and to a degree not often seen, for Duff was permitted to open and read certain letters written by Jones, which are not generally read by third persons. Duff had for years been authorized to take the letters of Jones out of the post-office at Rogersville, and to forward them when he was absent, and the postmaster always put them into the box of Simpson, Duff & Co. Jones and J. K. Simpson (the active member of the firm) were connected by marriage; and Cocke, who wrote the letters from Baltimore, was also his relative, and a member of the firm of G. W. Howard & Co., whose name

was stamped on the envelopes. This fact Duff knew, and as his house had no dealings with Howard & Co., it was very natural for him to suppose that the letters were on business requiring prompt attention, which, as an act of kindness, he ought to give to it, during the absence of Jones.

Cannot Duff's authority to open these letters be fairly inferred from these circumstances, and who can say that he erred in doing so? It is true that he committed an error in not informing Jones that he had opened them, but no harm resulted from that omission. The *right* to open them cannot be affected by what occurred afterwards. These letters were not detained, but were immediately resealed and forwarded to Florence, Alabama, where Jones lived. There is absolutely no evidence raising a presumption even that they were withheld. Duff was probably to blame for telling Simpson the purpose for which they were written; but he could hardly have refrained from doing so; and if he obtained the information rightfully, what principle of law or morals prevented Simpson, Duff & Co. from paying their Baltimore creditors, who had indulged them, and were then pressing them for payment? If they had acted otherwise, they would have been justly censurable. Their obligation was to Dunham & Kearfoot, not to Dall, Gibbon & Co., and the information obtained simply hastened the payment of an overdue debt, which they had for some time been endeavoring to procure exchange to discharge.

But if Duff had not opened the letters, is it not manifest that Jones, on his arrival in Rogersville, would have communicated their contents to Simpson?

Jones swears that he would, on account of their intimacy, and because Cocke had directed him to do so. And if Dall, Gibbon & Co. authorized their attorney to consult Simpson, and give him the same information which Duff did, how can they complain of the *manner* in which the information was obtained?

The procurement of Cocke, who had nothing to do with the matter, to select an attorney in Tennessee, who was his

relative and also a relative of one of the Simpsons, was a contrivance to obtain more surely and easily the information on which the proceedings in attachment could be founded. The scheme was a failure, and Dall, Gibbon & Co. have no just right to complain. They are in no proper sense the losers by the conduct of Duff. The result would have been the same if Jones had got the letters unopened, for he would have told Simpson what he wanted; and it is easy to see that, instead of responding to his request, the firm would, in obedience to a plain sense of duty, have paid their just debts to their own creditors.

On what basis, then, can this claim be sustained? The examination of the record discloses none, and we are unable to supply the omission.

The judgment of the Circuit Court is reversed, and a

NEW VENIRE AWARDED.

BEARD v. FEDERY.

1. The act of August 31st, 1852, relating to appeals from the Board of Land Commissioners to ascertain and settle private land claims in California, created under the act of March 3d, 1851, provides that the filing of a transcript of the decision and proceedings of the board with the clerk of the District Court shall operate *ipso facto* as an appeal on behalf of the party against whom the decision was rendered, and that the attorney-general shall, within six months after receiving a certified transcript of such decree and proceedings, when the decision is against the United States, cause notice to be filed with the clerk that the appeal will be prosecuted, and on failure to give such notice that "the appeal shall be regarded as dismissed." Under this act—

   Held, that when the attorney-general gave notice that he would not prosecute the appeal, such appeal was for all legal purposes in fact dismissed, and the decree of the board took effect precisely as if no appeal had ever been taken; and an order or decree of the District Court giving leave to the claimant to proceed upon the decree of the board as upon a final decree was a proper disposition of the case.

2. To give jurisdiction to the Board of Land Commissioners to investigate and determine a claim to land alleged to have been derived from the

Spanish or Mexican governments, it is not necessary that the petition of the claimant should aver that such claim was supported by any grant or concession in writing; it is sufficient if the petition allege that the claim asserted was by virtue of a right or title derived from either of those governments. The right or title may rest in the general law of the land.

8. All Mexican grants in colonization, under the decree of 1824 and the regulations of 1828, were made subject to the approval of the Departmental Assembly. Until such approval they were not definitively valid. If not thus approved before the change of jurisdiction, it devolved upon the United States, succeeding under the stipulations of the treaty of cession to the obligations of the former government, to complete what thus remained imperfect. By the act of March 3d, 1851, the United States have declared the conditions under which they will discharge their political obligations to Mexican grantees.

4. The legislation of Congress requiring all claims to lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, to be presented to the Board of Commissioners created under that act for investigation and settlement, and providing that all claims which are not thus presented within a specified period shall be considered and treated as abandoned, is not subject to any constitutional objection, so far as it applies to grants of an imperfect character which require further action of the political department of government to render them perfect.

5. A patent of the United States issued upon a confirmation of a claim to land by virtue of a right or title derived from Spain or Mexico is to be regarded in two aspects,—as a deed of the United States, and as a record of the action of the government upon the title of the claimant as it existed upon the acquisition of California. As a deed its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners. As a record of the government it is evidence that the claim asserted was valid under the laws of Mexico, that it was entitled to recognition and protection by the stipulations of the treaty; and might have been located under the former government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government and parties claiming under the government, this record, so long as it remains unvacated, is conclusive.

6. The term "third persons," mentioned in the fifteenth section of the act of March 3d, 1851, against whom the decree and patent of the United States are not conclusive, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.

7. In the Federal courts for the California circuit (which have herein

adopted the practice prevailing in the State courts under the State act regulating proceedings in civil cases), not only may distinct parcels of land, if covered by one title, be included in one complaint or declaration, but, with a demand for these, may be united a claim for their rents and profits, or for damages for withholding them.

8. Under this act, the provision as to the description by metes and bounds of the lands sued for, is directory, only.
9. When the pleadings in an action of ejectment do not state the value of the property in controversy, the value may be shown at the trial.

AFTER our conquest of California, in 1846, Congress, by act of 3d March, 1851, "to ascertain and settle the private land claims" in that State* constituted a board of commissioners, in the nature of a judicial body, before which, claims to land there were to be investigated. Every person claiming lands there "by virtue of any *right* or *title* derived from the Spanish or Mexican governments" was to present his claim to this board with the documentary and other evidences of it: notice of depositions, when taken, were to be given to the law officers of the United States. In case of confirmation of the claim, an appeal was given the United States to the District Court; in which case, says the act (§ 10), that court *shall proceed to render judgment* upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court. If the decree in that court was adverse to the government, an appeal was given to this court. The act declares that "for all claims *finally confirmed* by the said commissioners or by the District Court, or the Supreme Court, a PATENT shall issue to the claimant,"—but that such patent shall be "*conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.*" It declares moreover "that all lands, the claims to which shall not have been presented to the said commissioners within two years after the date of the act, shall be deemed, held, and considered as part of the public domain of the United States."

One section of the act—the 16th—enacts that it shall be "the duty of the commissioners to *ascertain and report* to the

* 9 Stat. at Large, 631.

secretary of the interior the *tenure* by which the *Mission Lands** are held."

A subsequent statute,† that of August 31, 1852, and amendatory of the former act, provides that, when a final decision is rendered by the commissioners,

"It shall be their duty to have two certified transcripts prepared of their proceedings and decision, and of the papers and evidence on which the same are founded; one of which transcripts shall be filed with the clerk of the proper District Court, and the other shall be transmitted to the Attorney-General of the United States, and the filing of such transcript with the clerk aforesaid shall *ipso facto* operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against such private claimant, it shall be his duty to file a notice with the clerk aforesaid, within six months thereafter, of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the attorney-general, within six months after receiving said transcript, to cause a notice to be filed with the clerk aforesaid, that the appeal will be prosecuted by the United States; and on a failure of either party to file such notice with the clerk aforesaid, the appeal shall be regarded as dismissed."

Under the first act, Alemany, Bishop of Monterey, presented his petition to the commissioners for confirmation of a claim which he made to certain lands described by him, including church lands at the Mission of San José, consisting of the church, churchyard, burial-ground, orchard, and vineyard, with the necessary appurtenances; the whole embracing a little over nineteen acres of land. His petition averred, in substance, that by the laws of Spain, from time immemorial, and by the laws of the republic of Mexico at the time of the cession of California to the United States, the canon law of the Roman Catholic Church had the force of law in all things relating to the acquisition, transmission, use, and disposal of property, real or personal, belonging

* Lands occupied by the Roman Catholic Church missions.

† 10 Stat. at Large, 99.

to the Catholic Church, or devoted to religious purposes, or to the service of God; and that by the same laws it was not necessary that any grant of land for ecclesiastical or church purposes should be proved by any deed or writing, public or private; but the right of the church to the property devoted to religious purposes, &c., was always recognized as regulated by the canon law. That the premises of which he sought confirmation had been for a long term of time devoted to religious purposes and uses, the public worship of God, the administration of the sacraments, and sacrifice of the church; according to the rites, ritual, and ceremonial, of the said Catholic Church. That by the canon law, and the laws of Spain and Mexico, the title, control, and administration of this and all other church property of the same description, absolutely essential to the religious uses and purposes above mentioned, was vested in the bishop and clergy of the diocese, who, for such purposes, were regarded as a body corporate; that the Catholic Church, at the date of the conquest and cession of California to the United States, had been in the actual and undisturbed possession of the premises in question since the year 1797; and that for the purpose of enabling him to hold the property, and rightly administering it for the use of the church, he, the petitioner, had been made a corporation sole by the State of California, under the title of "Bishop of Monterey."

The board confirmed the claim of the bishop. *The United States appealed to the District Court.* Subsequently, however, the attorney-general gave notice that "an appeal would *not* be prosecuted in the case, and the District Court, on the 16th March, 1857, at a stated term, ordered, adjudged, and decreed that the claimant have leave to proceed under the decree of the United States Land Commission, heretofore rendered, in his favor, *as a final decree.*"

Thereupon *a patent issued to the bishop, from the United States.* It recited the bishop's petition, the decree of confirmation by the board in his favor, the appeal by the United States, and the notice that it would not be prosecuted, and in usual form gave and granted the lands to the bishop and his suc-

cessors, in trust, &c., having about it every circumstance of formality.

Of the same lands, thus the subject of confirmation and patent to the Bishop of Monterey, one of the governors of California, Pio Pico, on the 20th of June, 1846—Mexico being then invaded by the United States, but the authority and jurisdiction of the Mexican officers not having yet terminated*—made a grant to a certain Castenada and others. The grant recited on its face that the governor had been authorized previously, by the Departmental Assembly, "to alienate the Missions, with the end of preventing their total ruin, and providing the government with the resources which it then immediately for its exigencies required."† Neither the said grant, however, nor any claim founded thereon, had ever been submitted for confirmation to the Board of Land Commissioners; and neither the grant nor any copy or counterpart or record of it, or any paper relating to it, existed or was to be found among the archives of the Mexican government; though the parties who held under it asserted and declared themselves able to prove that it was executed on the day it bore date, and that the consideration-money named in it, $3000, had been on that day paid.

Upon this state of titles, as they appeared from deeds produced or offered, one Federy, claiming title through the patent to the Bishop of Monterey, brought ejectment, in the Circuit Court for the Northern District of California, against Beard, who relied on the title derived under the deed of Governor Pico.

In the State courts of California—their practice in common-law cases being adopted essentially in the Federal tribunals there—a statute allows a plaintiff to unite in the same complaint claims "to recover specific real property, with or without damages for the withholding thereof, or for

* They terminated 7th July, 1846. See United States v. Yorba, 1 Wallace, 428.

† For an interesting exhibition of the various documents issued by the Governor of California, in the exigent moment here spoken of, see United States v. Workman, 1 Wallace, 753–4.

waste committed thereon, and the rents and profits of the same;" though the same statute provides that such property "shall be described with its *metes and bounds.*" In this case the declaration (or complaint, as it is called in California) demanded three parcels of land, describing one by metes and bounds; one as "having two springs of water thereon, and lying outside of the adobe wall which inclosed a garden and orchard" previously described; and the third as having "a mill-dam and a pond or reservoir of water thereon, lying to the north or northeast, or thereabouts, of the said adobe wall."

The plaintiff, *in the same action*, demanded judgment for possession of the premises, for mesne profits, stated to be $5000 a year, and for costs and damages, the last alleged at $1000. *On the trial*, the claim for mesne profits was stricken out; but it was *then* mutually admitted that the value of the first item of the three parcels claimed, and the only one recovered, was $2500.

After judgment for the plaintiff for one of the parcels, the case came here on error taken by the defendants. Several points were made in their behalf. They were these: *Mr. Wills arguing in support of them:*

1. That under the 10th section of the act of 1851—which says, in terms, that on an appeal from the commissioners to the District Court, that court *shall* proceed to render *judgment* upon the pleadings and evidence in the case—it was the *duty* of that court to proceed and render judgment; that, upon the refusal of the attorney-general to prosecute the appeal, the court should have *dismissed* the appeal or affirmed the decree of the board; that, having done neither, the case was still pending undetermined, and consequently that there had been no decree on which a patent could issue.

2. That the petition of the Bishop of Monterey to the commissioners did not show that he claimed "by virtue of any right or title derived from the Spanish or Mexican government;" on the contrary, that it showed that the missionaries of the Roman Church had had but a permissive possession—though a long, peaceful, and unquestioned one

under government protection—and, therefore, did not show *right* or *title;* but, on the contrary, showed affirmatively *no* right, *no* title. Precedents could be cited in support of this view.* Moreover, the 16th section of the act under which the commissioners sit required them "to *ascertain and report*" to the secretary of the interior the tenure by which the mission lands were held, and by strong inference deprived them of power to pass upon the validity of the claim of the church to them. The lands in question were confessedly of this class. The board, then, had acted on a case without its jurisdiction; and its action was void. The patent founded on its void action was also and equally void. The case fell within *Paterson* v. *Winn*, in this court.†

3. That the grant by Governor Pico—having been, not a grant in colonization, but a sale, according to a recital on its face, made by order of the Departmental Assembly; a sale, too, to save the nation in a crisis of supreme need—vested a good title in the parties under whom Beard claimed, anteriorly to the patent to the Bishop of Monterey; a title not to be divested by any title subsequent to the conquest. The fact that this grant by Governor Pico was not submitted to the commissioners within two years from the 3d March, 1851, was unimportant. The act never meant to destroy titles complete and fully existing anterior to the conquest.

4. That if the commissioners could pass upon the claim of the church to these lands, yet, by the terms of the act of March 3, 1851, the patent is "conclusive between the United States and the claimants *only*," and does not affect the interests of *third persons;* language which is plain, and conformable to the principles of common law, which deprives no man of his property unless upon hearing. The patent is, therefore, not evidence against the defendants for any purpose, and as between them and the plaintiff the whole subject of title was open.

The plaintiff, therefore, having offered *no legal evidence of*

* Nobile v. Redman, 6 California, 225; United States v. Cruz Cervantes, 18 Howard, 553.

† 11 Wheaton, 380.

title, as against the defendants, *they* should have had judgment.

A party who had no title, under any right or title derived from Spain or Mexico, acquired none *as against third parties by a patent from the United States.* A patent in such a case only protected the claimant *against the United States.* His original title or possession must be shown, as against all others.

5. That the two last parcels of land were not described with sufficient certainty; and that the complaint united in one count three distinct causes of action; and united, also, a claim for damages for the rents and profits and detention of the land, with a claim to recover possession; a position which was apparently taken by Mr. Wills without knowledge that the Federal court in California had adopted the State rule of practice in this matter as its own; a fact which the learned judge of the tenth circuit announced from the bench to him, arresting argument on that point.

6. That by striking out from the complaint or declaration the claim for the rents and profits, the court had lost jurisdiction of the case, the argument hereon being that the facts necessary to give jurisdiction must appear affirmatively in the *pleadings;* that here the value of the land, as shown in the pleadings, was made to depend on the amount of damages, viz., $1000, and the claim for mesne profits $5000; that these having been both stricken out, left the court, *under the pleadings*, without jurisdiction, and that this defect of the pleadings could not be supplied by proof or admissions made on the trial.

Mr. Carlisle, who argued the case thoroughly on principle and precedents, contra.

Mr. Justice FIELD delivered the opinion of the court.

The plaintiff in the court below deraigned his title by various mesne conveyances from Joseph S. Alemany, Catholic bishop of Monterey, to whom a patent, embracing the premises in controversy, was issued by the United States. The patent is in the usual form, and purports on its face to be

issued under the act of March 3d, 1851, to ascertain and settle private land claims in the State of California. It recites that the bishop presented his claim to the board of commissioners created under that act, for confirmation; that the board, by its decree, rendered on the 18th of December, 1855, confirmed the claim; that an appeal was taken on behalf of the United States to the District Court; and that the attorney-general, having given notice that the appeal would not be prosecuted, the District Court, by its decree, gave leave to the claimant to proceed upon the decree of the board as upon a final decree. Upon this form of the decree of the District Court, thus recited, the defendants below objected to the introduction of the patent, and the objection is pressed in this court. Their position is, that under the tenth section of the act of 1851 it was the duty of the District Court to proceed and render judgment upon the pleadings and evidence in the case; that, upon the refusal of the attorney-general to prosecute the appeal, the court should have dismissed the appeal or affirmed the decree of the board; that, having done neither, the case is still pending undetermined, and consequently there has been no decree on which a patent could issue.

The objection is a very narrow one, and does not merit the attention which it has received from counsel. Its answer is found in the amendatory act of August 31st, 1852. That act provides that when a final decision is rendered by the commissioners they shall prepare two certified transcripts of their proceedings and decision, and of the papers and evidence upon which the same were founded, one of which shall be filed with the clerk of the proper District Court, and the other shall be transmitted to the attorney-general; that the filing of the transcript with the clerk shall operate *ipso facto* as an appeal on behalf of the party against whom the decision is rendered; and, if the decision be against the United States, that it shall be the duty of the attorney-general, within six months after receiving the transcript, to cause a notice to be filed with the clerk that the appeal will be prosecuted; and, on failure to give such notice, "the ap-

peal," says the statute, "shall be regarded as dismissed." If it can be regarded as dismissed, it is for all legal purposes in fact dismissed. Here the attorney-general did not allow his intention to be drawn from his silence; he announced it at once. The decree of the court authenticates by its record the refusal of the attorney-general, not leaving this fact open to contestation by oral proof. The form of the decree is the usual one adopted in such cases, and probably a large number of patents issued to parties in California contain a similar clause. By the action of the attorney-general the decree of the board took effect precisely as though no appeal had ever been taken, and it certainly cannot constitute any valid objection to the decree of the court that it declares in terms the effect which the law gave to such action.

After the patent was admitted in evidence the defendants produced the petition of the claimant to the Board of Land Commissioners, and insisted that it showed a want of jurisdiction in the board in this, that it did not set forth any right or title derived from the Spanish or Mexican government. The position of the defendant appears to have been, that the claim of the bishop was invalid because it did not rest upon, or was not sustained by, any direct grant or concession in writing.

The petition sets forth two sources of title, one founded on the laws of Spain and Mexico, and the other on continued possession of the property for a period exceeding half a century. It avers that, at the time of the conquest and cession of California to the United States, the canon law of the Roman Catholic Church was in force as the law of Mexico, as it had been previously of Spain when Mexico was a dependency thereof, in all things relating to the acquisition, transmission, use, and disposition of property, real and personal, belonging to the church, or devoted to religious uses; that, by the laws of Spain and Mexico, it was not necessary that a grant of land for ecclesiastical or church purposes should appear by deed or writing, public or private, but that the right of the church to such property was always recognized as regulated by the canon law; that the premises in ques

tion, being church lands at the mission of San José, consisting of the church, churchyard, burial-ground, orchard, and vineyard, with the necessary buildings and appurtenances, the whole embracing a little over nineteen acres of land, had for a long period been devoted to religious purposes and uses; that, by the canon law and the laws of Spain and Mexico, the title, control, and administration of all ecclesiastical and church property was vested in the bishop and clergy of the diocese, who, for such purposes, were regarded as a body corporate; and that the Catholic Church, at the date of the conquest and cession of California to the United States, had been in the actual and undisturbed possession of the premises in question since the year 1797.

These averments clearly present a case within the jurisdiction of the Board of Commissioners. They show "a claim by virtue of a right or title derived from the Spanish or Mexican government," which is all that is required by the act of 1851. That act does not define the character of the right or title, or prescribe the kind of evidence by which it shall be established. It is sufficient that the right or title is derived from the Spanish or Mexican government, and it may in some instances rest in the general law of the land, as is the case usually with the title of municipal bodies, under the Spanish and Mexican systems, to their common lands.

The board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence. The rule which applies to the judgments of other inferior tribunals applies here,—that when it has once acquired jurisdiction its subsequent proceedings cannot be collaterally questioned for mere error or irregularity.

The grant of Pio Pico, bearing date on the 20th of June, 1846, under which the defendants below claimed title to the greater part of the premises in controversy, was rightly excluded. With the offer of the grant the defendants admitted

that it had never been presented to the Board of Land Commissioners for confirmation, and had never been confirmed. The court treated the grant as one in colonization. All such grants, it is a matter of common knowledge with the profession in California, were made subject to the approval of the Departmental Assembly. Until such approval they were not definitively valid; and no such approval was obtained of the grant in question previous to the 7th of July following, when the jurisdiction of the Mexican authorities was displaced, and the country passed under the government of the United States. It remained for the new government succeeding to the obligations of the former government to complete what thus remained imperfect. By the act of March 3d, 1851, the government has declared the conditions under which it will discharge its political obligations to Mexican grantees. It has there required all claims to lands to be presented within two years from its date, and declared in effect that if, upon such presentation, they are found by the tribunal created for their consideration, and by the courts, on appeal, to be valid, it will recognize and confirm them, and take such action as will result in rendering them perfect titles. But it has also declared in effect, by the same act, that if the claims be not thus presented within the period designated, it will not recognize nor confirm them, nor take any action for their protection, but that the claims will be considered and treated as abandoned. It is not necessary to express any opinion of the validity of this legislation in respect to perfect titles acquired under the former government. Such legislation is not subject to any constitutional objection so far as it applies to grants of an imperfect character, which require further action of the political department to render them perfect.

The Circuit Court, as already stated, treated the grant as one in colonization. This was the most favorable view for the defendants, for if the recitals that it was made upon a sale of mission lands, and upon authority conferred by the Departmental Assembly, are to determine its character, it is without any efficacy in passing the title. It is simply a void

instrument, and falls directly within the decision of this court in the *United States* v. *Workman*.* In that case the powers of the Departmental Assembly in the alienation of lands were very fully and elaborately considered, and particularly its asserted power to authorize the governor to sell the mission lands, and it was held that this body could not confer any power upon the governor, and that its own power was restricted to what was conferred by the laws of colonization, which was simply to approve or disapprove of grants regularly made by the governor under those laws.

This grant being laid out of the case, the only question for determination is, whether the defendants constitute third persons within the meaning of the fifteenth section of the act of March 3d, 1851. That section provides that the decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. The position of the defendants is, that as against them the patent is not evidence for any purpose; that as between them and the plaintiff the whole subject of title is open precisely as though no proceedings for the confirmation had been had, and no patent for the land had been issued. Their position rests upon a misapprehension of the character and effect of a patent issued upon a confimation of a claim to land under the laws of Spain or Mexico.

In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quit-claim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners.†

In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law

* 1 Wallace, 745. † Landes v. Brant, 10 Howard, 373.

of nations to protection in them to the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation, to which the United States thus succeeded, was of course political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3d, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the District and then to the Supreme Court; and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an

instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, or was not properly located, and, therefore, he could not be disturbed by the patentee. No construction which will lead to such results can be given to the fifteenth section. The term "third persons," as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.

It only remains to notice the objections taken to the complaint in this case. They are advanced in misapprehension of the system of pleading and practice which prevails in the State of California. The system is there regulated by statute, and differs in many important particulars from the system which existed at the common law. There the ancient forms of action are abolished. In every case the plaintiff must state, in ordinary and concise language, his cause of action, with a prayer for the relief to which he may deem himself entitled. The fictions of the action of ejectment at common law have no existence. The names of the real contestants must appear in the pleadings. The complaint, which is the first pleading in the action, must allege the possession or seizin of the premises, or of some estate therein, by the plaintiff, on some day to be designated, the subsequent entry of the defendant, and his withholding the premises from the plaintiff. No other allegations are required, where possession of the property alone is demanded. But in the same action there may be united a claim for the rents and profits, or for damages for withholding the prop

erty, or for waste committed thereon.* Distinct parcels of land may also be included in the same complaint where they are covered by the same title, and the action equally affects all parties. The property should be described, if practicable, by metes and bounds; but this is not essential. The provision of the statute on the subject is only directory, its object being to insure such particularity of description, as to enable the officer, who may be charged with the execution of a judgment for the possession, to ascertain the locality and extent of the property. A description by name, where the property is well known, will often answer equally with the most minute description by metes and bounds.†

This brief statement of the system of pleading and practice existing in California will furnish the answer to the several objections urged. That system, with some slight modifications, has been adopted by rule of the Circuit Court of the United States in common-law cases.

When by the consent of parties on the trial the claim for the rents and profits was stricken from the complaint, the court did not lose jurisdiction of the case, because the value of the property did not appear by any allegations of the pleadings. It was admitted that the first parcel, the only one recovered in the action, was of the value of twenty-five hundred dollars. This was sufficient, for it has long been the settled practice of the courts of the United States in actions where the demand is not money, and the nature of the action does not require the value of the property in controversy to be stated, to allow the value to be proved at the trial.‡

JUDGMENT AFFIRMED.

* Act regulating proceedings in civil cases, § 64.

† Castro v. Gill, 5 California, 40; Doll v. Feller, 16 Id. 432; Payne & Dewey v. Treadwell, 16 Id. 248.

‡ *Ex parte* Bradstreet, 7 Peters, 647.

BANK FOR SAVINGS v. THE COLLECTOR.

1. Savings banks which receive deposits and lend the same for the benefit of their depositors, although they may have no capital stock, and neither make discounts nor issue any money for circulation, are "engaged in the business of banking" within the meaning of the first clause of the 110th section of the Revenue Act of 30th June, 1864, which enacts that "there shall be levied, collected, and paid a duty of $\frac{1}{24}$th of 1 *per cent.* each month upon the average amount of the *deposits* of money . . . . . with any person, bank, association, corporation, or company *engaged in the business of banking.*"
2. On the repeal of the proviso to that section, which declared that the section should not apply "to any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning the same on interest for the benefit of the depositors only, and which do no other business of banking," such savings banks became subject to the duty imposed by the principal enactment.
3. Moneys received by such banks from depositors become "deposits" within the meaning of the act as soon as they are received, and as such are immediately subject to taxation.
4. In interpreting a section of a statute which remains in force, resort may be had to a *proviso* to it, although the proviso be repealed.

THE 110th section of the Internal Revenue Act of June 30, 1864, enacted as follows:

"There shall be levied, collected, and paid a duty of $\frac{1}{24}$th of one per cent. each month upon the average amount of the *deposits* of money subject to payment by check or draft, or represented by certificates of deposit, or *otherwise*, whether payable on demand or *at some future day*, with any person, *bank, association, company, or corporation, engaged in the business of banking.* . . . .

"And a duty of $\frac{1}{24}$th of one per cent. each month, as aforesaid, upon the average amount of the capital of any bank, association, company, or corporation, or person engaged in the business of banking beyond the amount invested in United States bonds.

"And a duty of $\frac{1}{12}$th of one per cent. each month upon the average amount of circulation issued by any bank, association, corporation, company, or person; including as circulation all certified checks, and all notes and other obligations calculated or intended to circulate or be used as money.

"PROVIDED, That this section shall not apply to associations which are taxed under and by virtue of the act 'to provide a national currency,' &c. . . . . [Nor to any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning the same on interest for the benefit of the depositors only, and which do no other business of banking."]

By an act of March 3, 1865—an act itself of numerous pages—amendatory of the former one, and inserting or striking out passages all through it, this 110th section was amended by "striking out" that part of the proviso relating to savings banks, and above inclosed in brackets.

In this state of the revenue statutes, "The Bank for *Savings* in the City of New York," a respectable institution, incorporated by the State of New York, A.D. 1819, was existing in the city just named. The features which, under its charter and by-laws, distinguished, as was conceived by its managers, this corporation from those which exercise to some extent the same functions, and especially from ordinary *banking corporations* and *associations*, were apparently these:

1. It was incorporated, not for private gain, but upon the application of the Society for the Prevention of Pauperism in the City of New York.

2. It had no capital stock.

3. It had no shareholders, and no corporators interested in or entitled to participate in the profits of the institution.

4. The corporators were the "trustees" for the time being, who constituted the "Board of Managers." These were prohibited from directly or indirectly receiving any pay or emolument for their services; neither could they have any interest in the deposits or the profits arising therefrom.

5. It was prohibited from issuing notes, making discounts, or transacting any business which belongs to or is transacted by incorporated banks other than is specified in the act, and from lending money "upon notes, bills of exchange, drafts, or any other personal securities whatever."

6. It was enjoined and required to use the funds intrusted to it, and exercise the powers conferred for the promotion of the objects stated in the preamble to its charter, viz.,

"encouraging in the community habits of industry and economy, by securing and investing in government securities or stock created and issued under and by virtue of any law of the United States, or of this State, *and in no other way, such small sums of money as may* BE SAVED *from the earnings of tradesmen, mechanics, laborers, minors, servants, and others,* thereby affording the twofold advantage of security and interest."

Its object, as declared in the preamble, was "to ameliorate the condition of the poor and laboring classes of the community."

[Power was subsequently given to invest in the debt of the city of New York, and to lend upon bond secured by mortgage upon unincumbered real property in the city of New York; and the institution was subjected to a closer scrutiny by the officers of the State.]

7. *All the profits* derived from the business were divisible *ratably semi-annually* among the depositors, except that a small percentage was permitted to be retained for accumulation, to prevent or to make good any loss to the depositors by reason of a reduction in the market price of securities or stocks held below the par value.

8. Money, when received by it from its depositors, was to be entered in a *pass book*, which, when presented, was a voucher or warrant for payments made by the bank and entered in the book; and the corporation—which by its charter had power to pay cash to depositors when required, and at such times and with such interest and under such regulations as the trustees should from time to time prescribe—could by its by-laws only be called upon to make payments either of principal or profits on *four stated days* in the year, and then only *upon a week's notice* of the intended call. It was at liberty, however, to return all or any part of any deposit whenever it thought proper; and moneys might "be voluntarily paid by the bank daily and without such notice, and without thereby waiving the right of the bank to such notice and time of payment."

One of its by-laws was that "all *drafts* must be made per-

sonally, *or* by order in writing, ... and must be accompanied by the pass book."

9. All the money received by it under the charter was, and at all times had been, either actually invested in stocks or lent on bond and mortgage, except some small sum which was kept on deposit in a bank of deposit in the city for current expenses, or waiting an opportunity to invest.

10. Deposits of $1, or of any number of dollars, were receivable; but no person, "except in rare and special cases," and with the special direction of the attending committee, was allowed to have with the corporation moneys amounting in the aggregate to more than $1000, and in no case could the amount exceed $5000. Those having less than $500 with the corporation were, by law, entitled to receive one per cent. more of the profits than the others.

11. A large proportion of the depositors, it appeared, had incomes less in amount than $600 per annum, and were not liable to pay an income tax.

12. Courts were enjoined, by the charter of the institution, to construe the act of incorporation favorably and benignly for every beneficial purpose therein intended.

It was not asserted that the corporation had in any way exceeded its powers, or violated the laws of its creation.

The character of its "depositors" appeared from a return of the new ones in 1865. These numbered 13,071; of whom 5905 were married women, minors, &c.; 300 washers, 571 seamstresses, 798 laborers, 1534 domestics. About four-fifths of the deposits were in sums of less than $100.

It may be here well to add that the statute of 1864, already spoken of, enacts by its 79th section thus:

"Every person, firm, or company, and every incorporated or other bank having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order; or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes; or where stocks, bonds, bullion, bills of exchange, or promissory notes, are received for discount or sale shall be regarded a *banker* under this act.

Statement of the case.

"PROVIDED, That any savings bank, having no capital stock, and whose business is confined to receiving deposits and loaning the same for the benefit of its depositors, and which does no *other business of banking*, shall not be liable to pay for a license as a banker."

In the amendatory act of 1865, the above given proviso to this 79th section, a proviso which, the reader will have observed, much resembles that to the 110th section, was *not* stricken out.

The directors of the institution, conceiving that this was not a corporation "engaged in the business of banking," nor otherwise within the sections of the act already quoted, made no returns for several months to the assessor of the United States of the average amount of the deposits out on loan or invested for individuals in pursuance of its charter, as every corporation engaged in the business of banking is required to do. Hereupon the assessor estimated the amount as the statute provides in cases of delinquency, and these being returned to and adopted by the commissioner, the last-named officer gave a warrant to the collector of the district, to collect the amount as estimated and assessed, with penalties. The collector, being about to proceed accordingly, the corporation filed a bill in the Supreme Court of New York to enjoin him. A preliminary injunction having been granted there, the case was removed by *certiorari* into the Circuit Court of the United States for the Southern District of that State.

The case coming on to be tried, the judges there were divided on the following questions:

1. Whether the Circuit Court could restrain the collection of the tax and penalties by injunction?

2. Whether an injunction could properly issue in *this* case?

3. Whether under the 110th section of the act of June 30th, 1864, as amended by the act of March 3d, 1865, the corporation was liable to pay a duty of $\frac{1}{24}$th of *one per cent.* per month on the average amount of money so received and invested or lent as aforesaid, and represented and entered in the pass-book as afore-

said, and payable to the parties entitled under the laws of the corporation already sufficiently set forth.

4. Whether moneys so received and invested were deposits within the meaning of the acts of Congress.

5. Whether moneys received on deposit in any one month and invested as aforesaid during the same month, were deposits within the meaning of the said acts, so as to render the plaintiff liable to pay a tax thereon for such month.

And on a certificate of division these questions were now before this court.

Messrs. Allen, Strong, and Bidwell, for the Bank for Savings:

The main question, and the one upon which all the others turn, is this:

Are these moneys—received for investment, and actually invested, or permanently lent for the sole benefit of the owners, and repaid with the profits, if any have been earned, at stated periods upon notice, upon a prescribed voucher, and upon presentation of the "pass-book" as a voucher,—taxable as "deposits with a person or corporation engaged in the *business of banking.*"

The other questions are unimportant. If the decision upon the merits is adverse to the plaintiff, the injunction necessarily falls, and if adverse to the United States there will be no attempt to enforce the collection of the tax. The questions, as to the injunction, are, therefore, as presented here, abstract questions, without particular interest.

The third and fourth questions are substantially the same, expressed in different terms, and must receive the same answers.

Now, this institution is not a "bank," by which term, in an unqualified presentation of it, is meant a bank of the ordinary kind. It is a Bank for *Savings* only. But if it still be a bank,—that is to say, a common repository for people's money, having a bench or counter,—it is assuredly not a bank "engaged in the business of banking." The business of banking consists in buying, selling, and discounting commercial paper, with or without collaterals; in issuing notes;

in making collections, and in receiving deposits of money and in paying them out on check, at call. This bank is engaged in none of these things. Will it be said that one sort of banks is banks of deposit, and that this is of that class? Certainly it is not of that class as *commonly* so called. Deposits in *any* sense of the term cannot generally be made in this "Bank for *Savings*:" and in the ordinary, popular commercial sense—which is the legal sense, also—and the sense in which, when used without restriction, the word "deposits" must be presumed to be used in the statute*—deposits, in no sense can. What is meant by the word "deposit?" In its widest sense it applies to any material thing laid down; other things as well as money. But in connection with banking and in ordinary commercial parlance it means money taken to a bank, left there, and understood to be subject to check or draft.† Money thus deposited and drawn on enters largely into the commerce of the country: checks and drafts are mercantile instruments, part of the machinery of trade, having commercial value and bearing no resemblance to the "pass-book" held by the poor seamstress, or washerwoman, or cook, who can go but four times a year and after notice to have a debit entered in it.

Neither, on the other hand, do "banks,"—*i. e.* companies or corporations "engaged in the business of banking" perform services like those performed by this bank for *savings*. The business of receiving, investing, or lending out the "savings" of the industrious poor, for the benefit of the poor themselves and irrespectively of advantage to the corporators, is not engaged in by any bank, whether the bank be one of deposit, or one of discount, or one of circulation, or, finally, one of all three characters combined. Banks avoid the poor; they seek, and properly, the rich: those who have

* Hallewell v. Morrell, 1 Scott's New Reports, 309.

† Bouvier's Law Dictionary, tit. Banker: where a banker is defined, "One engaged in the business of banking; receiving other people's money on deposit, *to be returned on demand*, discounting other persons' notes, and issuing his own for circulation." Curtis v. Leavitt, 15 New York, 9, 166, 168.

the largest deposits are there the welcomed guests. This institution is the friend and agent of the poor only. The rich are repelled, and those who have small deposits—less than $500—receive greater interest than those who have large ones—over $500. Indeed, banks would not, ordinarily, be permitted to perform the sorts of services which alone are performed by this institution. Public policy has not permitted the savings of the poor to be hazarded by the perils incident to commercial institutions and business.

Both State and national legislatures recognize the distinctive features of the two classes of institutions. The one class may, under the laws of Congress and the laws of most of the States, be organized under general laws, and by the voluntary action of those desiring to associate for gain, and they choose their own trustees or directors. "Banks for savings" are created by special charter, and the trustees or directors named by the legislature, and provision is made for the filling of vacancies in the management by the board itself.

In all books and treatises, "banks," and "banks for savings" are treated of as separate institutions, as distinct in all their characteristics as are "banks" and "insurance companies." *We* in New York call them sometimes "*banks* for savings." In other cities they are known by other names. In Philadelphia they are called universally "saving fund societies." In France they are distinguished from *banques* of any sort; being styled "*caisses* d'eparnes."

It cannot be supposed that Congress intended to make an innovation, and so by the Internal Revenue Act, to confound and make one two classes of institutions, always before regarded as entirely distinct, and having nothing in common between them, except a similarity of title.

What, then, in reality, is this institution? Its mere name, —though its name, a bank or common receptacle or repository for *savings* is not inappropriate—cannot impress upon it qualities which it has not. Its character must be determined by the services rendered and the business transacted, rather than by a title given for convenience or by accommodation, by any one. The "trustees" of the plaintiff are, in truth,

but the trustees of the individuals owning the fund, and for convenience permitted to act in a corporate name; and if the same individuals should perform the same services as individuals associated together for the benevolent purpose that now binds them in a body, it would never have suggested itself to any one that they were bankers or engaged in the banking business, or that the funds of their beneficiaries were taxable as "deposits" with such persons.

Negatively, the company is *not* a commercial institution, or one of business. Its transactions do not enter into or make a part of the ordinary commercial transactions of life. It has no capital and gain, and profit is not made to the corporation or its managers.

It *is* positively, as also pre-eminently and solely, a benevolent institution—a public charity—gratuitously rendering valuable service to the public, to its employers, and to the State.

The relation between the corporation and its poor beneficiaries is that of a TRUST. The money is received for investment, and the plaintiff is liable to account. The special contract evidenced by the entry in the "pass-book," creates the trust, and the relation of trustee and *cestui que trust*, between the plaintiff and the individuals availing themselves of its services, and the rights and obligations springing out of the contract are those incident to the relation named. The money to which the *cestui que trust* is entitled, may be more or less than the sum deposited, depending upon the result of the investments. The relation of debtor and creditor as distinguished from that of trustee and *cestui que trust* is probably not created and does not exist.

The whole force of any argument which can be made in opposition to our view must rest, we suppose, on the fact, that by a *proviso* to the 110th section of the act of 1864, this class of banks was by a specific description of their functions excluded, and that by the act of 1865 this proviso was repealed. But if it be clear that under the general or substantive enactment the institution was *not* liable, the proviso was

useless to discharge it, and the repeal of the proviso leaves the case where it was. Suppose it were enacted that all *white male* citizens of the age of twenty-one years shall pay a poll-tax, *provided* that no *women* or *children* shall be so charged. Could it be inferred from a repeal of such a proviso that women and children were meant to be made chargeable? Would it not rather be inferred that the proviso had been seen to be useless or absurd, and had been repealed on that account? Whatever might or might not be inferred, the repeal of the useless proviso would leave the principal and preceding enactment where it was; and if by *it* they were not charged they would not be chargeable at all.

So, too, here. This institution for savings, not being an institution in any way engaged "in the business of banking," its deposits were not liable under the principal enactment which makes liable to the tax no deposits but those of institutions so engaged. The proviso which exempts institutions for "savings" was therefore unnecessary; and, philologically, perhaps, even worse. It did but redeclare in a literal form that which was already declared in a legal and commercial and orthoepical and scientific one. The repeal of such a proviso, of course, left the preceding enactment where it was; that is to say, without savings banks included.

We all know that enactments are frequently made which do but declare what was already law; what would have existed just as well if the enactment had never been made. This is no strange circumstance in legislation. This term affords a case of this sort.* Especially is the observation true of what are called *provisos:* appendages, or clauses cast in adjectitiously at the suggestion of some one to remove a doubt which *he* had, or, more probably, supposed that some one else *might* have, but which no one would have had, and which, whether or not, would never have been declared a well-founded doubt by the law. Our internal revenue laws, the fruit of our civil war, have been recently and hastily enacted, in a crisis and emergency. They are enactments of

* See *supra*, p. 298; Cincinnati City v. Morgan.—REP.

immense magnitude, of a sort which was quite new to us; filled with obscure or incongruous provisions; and which if interpreted as some persons would seek to interpret them would seem to have been passed to show that Congress was seeking to exercise a despotism over the English language and to shame our mother tongue. In the present case we submit that the proviso was inserted *ex cautelâ* only, and, on a revision of the whole statute, has been repealed as superfluous

Consider this question on public policy and legislative probabilities. What are these "saving banks" or "saving funds," which exist in England, France, and all over the North of our own country?

In the State of New York there are seventy-three savings banks:*

Total deposits, ...	$111,793,425
Number of depositors, ...	456,721

The average amount of savings belonging to each depositor is $244 and a fraction; and there is about *one* depositor to every *nine* of the inhabitants.

In the New England States there are two hundred and twenty-two savings banks:

Total deposits, ...	$119,382,941
Number of depositors, ...	527,090

The average amount of savings belonging to each depositor being $226 and a fraction.

Of the number and character of the depositors in the institution before the court, the reporter gives some mention in his statement

The annual percentage of increase in savings, fostered and encouraged, if not in truth, wholly induced by these institutions, has been very great within the last few years. In New England it was thirty per cent. from January, 1862, to January, 1865. In New York greater.

A reference to the savings of Great Britain, in comparison with those in New England and New York, will show the

* Bankers' Magazine for July, 1865.

beneficial workings of these institutions, and that the true policy of the government is not to burden them with taxes of any description. Great Britain, with a population of 30,000,000, has aggregate savings deposits equal to $190,494,406, or about $6.33 per head. New England and New York, with a population of 7,500,000, has an aggregate savings deposit of $231,176,366, *or about* $30 *per caput.*

It will not be denied that the greater part of these savings are the fruits of institutions for savings, and that the laborers, mechanics, married women, and infants to whom they belong, would, but for the facilities for investment for accumulations of small sums thus afforded, have parted with them as they were earned, and that the State would have been the loser, the individuals so much the poorer, and the habits of thrift and good morals would have lacked the encouragement they now have.

Certainly, no wise government will tax institutions of these kinds, conducted upon principles and with motives such as govern the one here sought to be charged. They stand on the same footing as schools, churches, orphan asylums, hospitals, and those other foundations of religion and charity, and providence for the poor, which make the honor and glory of any land.

If well-known principles of law have settled it—as they have—that every act placing an imposition or tax upon the citizen is to be construed strongly against the government and liberally in favor of the citizen—that such acts are never to be extended by implication, and that their application will be restricted to cases within their spirit as well as to those within their words, with what an emphasis of reason do the principles apply to a case like this, where the collector seeks to take from the *capital* deposited in these institutions,—the capital of the poor, of even the very poor; "men who work for their daily pay; women who perform domestic services for their weekly wages; persons who have garnered up their little treasures, the dearer treasure to them as it has been pinched off and hoarded from the scanty supply of their personal comfort;" persons who have little power to protect

themselves against the arm of power, and who now look to this court only as their earthly avenger.

Mr. Speed, A. G., and Mr. Assistant Attorney-General Ashton, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.*

Immediate purpose of the suit in this case was to restrain the respondent, as the collector of internal revenue for the sixth collection district of the State of New York, from collecting certain internal duties or taxes assessed against the corporation complainants, by the commissioner of internal revenue. Charter of the complainants was granted by a special act of the legislature of the State of New York, passed on the twenty-sixth day of March, 1819, and entitled An Act to incorporate an association by the name of a Bank for Savings in the City of New York.

Statement of facts as proved or admitted shows that the complainants did business in the city of New York under that act of incorporation, and certain other acts of the legislature of the State, as detailed in the record from the date of their charter to the time of the filing of the bill of complaint. Complainants denied that they were subject to the payment of any internal duties or taxes as a savings bank, and they accordingly neglected and refused to make any returns either to the commissioner of internal revenue or to the assessor of the district. Failing to receive such returns the assessor of the district estimated the average amount of their deposits for the periods specified in the record, and certified the same to the commissioner of internal revenue as required by law in case of delinquency.

Assessor's estimates as certified were adopted by the commissioner as correct, and he thereupon proceeded to assess the duties or taxes in controversy, adding thereto certain penalties for the neglect and refusal to make the returns as

* Field, J., not having sat.

required by the act of Congress, and directed the respondent as the collector of that collection district to collect the amount so estimated and assessed.

1. Exemption from liability to taxation in the case is claimed by the complainants upon the ground that the corporation is not a bank, either in the ordinary and popular sense or in the legal sense of that word, and they allege that they have never transacted any business of banking within the meaning of the acts of Congress under which the duties or taxes were estimated and levied. Respondent in his answer alleged that the complainants were an incorporated savings bank within the usual and proper meaning of that term, and that as such they have been and were engaged in the business of banking as assumed by the revenue officers. Wholly unable to agree in opinion, the judges of the Circuit Court certified five questions to this court for decision, but in the view taken of the case it will not be necessary to examine the first two, as the answers to be certified to the other three will enable the Circuit Court to dispose of the cause.

2. Substantial import of the third question is whether the complainants are liable under the internal revenue acts to pay a duty of one-twenty-fourth of one per cent. per month on the average amount of money which they receive and invest or loan, as described in the statement of facts exhibited in the record.

Their powers are set forth in their charter and the other acts of the legislature to which reference has been made. Purpose of the charter as described in the preamble is to encourage in the community habits of industry and economy, by receiving and investing in government securities or in Federal or State stocks, such small sums of money as may be saved from the earnings of tradesmen, mechanics, laborers, minors, servants, and others. They are constituted by the first section of the charter a body corporate and politic by the name of the Bank for Savings in the City of New York, and the provision is, that by that name they shall have perpetual succession, and that they shall be capable of suing

and being sued, pleading and being impleaded, and defending and being defended in all courts and places whatsoever. Power to hold real and personal estate to such an amount as may be necessary for the purposes of the incorporation is also conferred, provided that the clear annual value thereof, exclusive of profits arising from interest or from the sale of any stock in which the deposits made in the bank may be invested, shall not exceed the sum of five thousand dollars.

Trustees or managers are appointed by the act of incorporation, but they are forbidden to receive any pay or emolument for their services, and it is provided that they shall not "issue any notes, make any discounts, or transact any business which belongs to or is transacted by incorporated banks, other than is herein specified." Funds of the corporation are required to be used and appropriated for the promotion of the objects stated in the preamble, and the second section of the charter provides, in effect, that the association shall receive as deposits, from persons of the description mentioned in the recital to the act, all sums of money which may, on the terms specified, be offered for that purpose, and that the same shall be invested accordingly, and shall be repaid to the respective depositors when required, and at such times, and with such interest, and under such regulations as the trustees shall from time to time prescribe.

3. Such trustees may make by-laws and regulations, and they are expressly required by the charter to regulate the rate of interest to be allowed to depositors, so that they shall receive a ratable proportion of all the profits of the bank after deducting all necessary expenses. Authority is conferred upon the trustees to manage the affairs of the bank, and for that purpose to appoint clerks and fix their salaries, but they are required to make an annual report of their funds to the legislature and to common council of the city. Subsequent enactments very much enlarged the powers of the trustees, and subjected the bank to a much closer scrutiny by the proper authorities of the State. Investment of the funds under those additional provisions may be made in any State stocks, where the faith of the State is pledged for

their redemption, or the moneys received on deposit may be loaned on bonds secured by mortgage of real estate in the city where the bank is located. They are also authorized to accumulate and "hold invested" a surplus fund, not exceeding ten per cent. on the amount of deposits, as a protection to depositors against loss in case of the reduction in the market price of their securities. Bank commissioners have the power to visit and inspect the bank under existing laws whenever they deem it necessary, or whenever thereto required by the comptroller of the State, and they are required to report the general condition of the bank to the legislature once at least in every three years.

4. Intention of Congress undoubtedly was, to impose a duty of one-twenty-fourth of one per centum each month, upon the average amount of deposits of money, subject to payment by check or draft, or represented by certificates of deposit, or otherwise, whether payable on demand, or at some future day, if made with any person, bank, association, company, or corporation engaged in the business of banking, except deposits with associations which were taxed under and by virtue of the act "to provide a national currency," and with savings bank having no capital stock, and whose business was confined to receiving deposits and loaning the same on interest, for the benefit of the depositors only, and which were doing no other business of banking.* Confirmation of that view is derived from the language of the next clause, which imposes the same duty upon the average amount of the capital of any bank, association, company, or corporation, or person engaged in the business of banking, beyond the amount invested in United States bonds.

Savings banks having no capital are not included in that provision; nor are they included in the next succeeding clause, which imposes a duty of one-twelfth of one per cent. each month upon the average amount of circulation issued by any bank, association, corporation, company, or person, including as circulation, all certified checks, and all notes

and other obligations calculated or intended to circulate or to be used as money. Such savings banks having neither capital nor circulation, did not fall within the words of either of those clauses, and consequently it did not require any proviso to exclude them from the operation of those provisions. But those banks, as banks of deposit, did fall directly within the words of the first clause of the section, and therefore it became necessary to insert the proviso near the close of the section, to exclude them from the otherwise plain meaning and operation of the clause.

Precise language of the proviso is, that the section shall not apply "to any savings bank having no capital stock, and whose business is confined to receiving deposits, and loaning the same on interest, for the benefit of the depositors only, and which do no other business of banking." More exact description of the corporation complainants than is expressed in the language of that proviso, could not be conceived; and it amounts to a legislative enactment, that the receiving of deposits and loaning the same on interest, for the benefit of the depositors, is a business of banking. Throughout the section the distinction between deposits, capital, and circulation as separate objects of taxation, is clearly maintained and enforced, both in respect to the monthly returns and the monthly payment of the duties.

Same remarks apply to the seventy-ninth section of the act, which requires bankers to pay a certain sum for a license, and defines the meaning of the word as used in the section. Doubt cannot be entertained that the definition as there given would have included savings banks having no capital stock, but for the proviso annexed to the clause, which is in the very words of the proviso under consideration.

5. Argument for the complainants is, that the proviso was only inserted out of abundant caution, and that it was unnecessary, inasmuch as such an association was not included in the substantive words of the section; but it is not possible to sustain that proposition for the reasons already given, as well as others which will be briefly stated. 1. Unquestion-

ably the complainants receive deposits as one of the primary purposes of the charter, and the second by-law of the bank provides, that "deposits of one dollar, or any number of dollars, may be received, but are not, in the whole, to exceed one thousand dollars from any depositor, without the special direction of the attending committee." General rule is, that no depositor is allowed to have deposits beyond one thousand dollars; but he may have that amount, and, in special cases, when it is made to appear that he can find no other investment, he may exceed that amount. 2. By the terms of their charter they are obliged to pay each depositor, when required, "and at such times, and with such interest, and under such regulations as the trustees shall from time to time prescribe."

Obligation of repayment exists throughout, and it cannot make any difference as to the liability of the complainants in this case that the entries are made in a pass-book, and that the depositors can only obtain their deposits at certain stated periods. Deposits are made to be invested for the benefit of the depositors, and the bank is under obligations to repay the amount when demanded, agreeably to the by-laws and charter. 3. Only remaining condition to bring the case within the words of the body of the act is, that the deposits should be made with a person, bank, association, company, or corporation engaged in the business of banking. Agreed case shows that the corporation complainants were engaged in receiving deposits, and loaning the same on interest for the benefit of the depositors. Irrespective of the definition given to that phrase in the language of the proviso, the same conclusion must be adopted from the facts exhibited in the statement of the case, unless it can be established that the receiving of deposits by a chartered company, and loaning or investing the same for the benefit of the depositors, is not a business of banking.

Banks, in the commercial sense, are of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation. All or any two of these functions may, and frequently are, exercised by the same association; but there are still banks of deposit,

without authority to make discounts or issue a circulating medium.*

"Banks for savings," says McCulloch, "are banks established for the receipt of small sums deposited by the poorer class of persons for accumulation at interest."† Definition given by Grant is more extended, but it amounts to the same thing.‡ Courts of justice, also, as well as text writers, recognize the well-known distinction between banks of deposit and banks of discount or circulation.§

6. Beyond all controversy the proviso, while it continued in force, had the effect to exclude the corporation complainants from the operation of the substantive words of the section. Since the passage of the act, however, the proviso has been stricken out, and the palpable effect of the repeal is to leave the body of the act in full force and operation, without any such qualification as was imposed by the proviso.‖ Although the proviso is repealed, still it is proper to resort to it as well as to the proviso in the seventy-ninth section of the same act, as affording a legislative exposition of what is meant by the phrase, engaged in the business of banking, as employed in the first clause of the section under consideration. Looking at the case, therefore, in any point of view, it is clear that the answer to the third question must be in the affirmative.

7. Fourth question presented for decision is, whether the moneys so received on deposit and invested, are deposits within the meaning of the act of Congress. Obviously the question as presented is substantially answered by the remarks already made in disposing of the preceding question. All the moneys received by the bank, whether for safe-keeping or for investment, are deposits within the meaning of their by-laws, and within the very words of their charter. Answer to this question, also, must be in the affirmative.

* Angel & Ames on Corporations, § 55; McCulloch's Commercial Dictionary, 78. † Id. 146. ‡ Grant on Banking, 614.

§ Duncan v. Savings Institution, 10 Gill & Johnson, 309; People v. Utica Insurance Co., 15 Johnson, 390; Grant on Banking, 1, 6, 381, 614.

‖ 13 Stat. at Large, 479.

8. Fifth question is, whether moneys received on deposit in any one month, and invested during the same month, are deposits within the meaning of said acts, so as to render the complainants liable to pay a tax thereon for such month. Moneys received, as already explained, whether invested or not, are deposits within the meaning of the acts of Congress, and if so, then it is clear that the amount, whatever it may be, is liable to taxation as soon as it is received by the bank, because when received by the bank, it becomes deposits, and continues to be such till it is repaid to the depositor. An affirmative answer must also be certified to this question.

No answers will be certified to the first two questions, because the court is of the opinion that those given to the others are sufficient to dispose of the cause.

ANSWERS ACCORDINGLY.

GRIER and NELSON, JJ., dissented; FIELD, J., who, as already said, had not sat in the case, took no part in the judgment.

THE BERMUDA.

1. No trade honestly carried on between neutral ports, whether of the same or of different nations, can be lawfully interrupted by belligerents; but good faith must preside over such commerce: enemy commerce under neutral disguises has no claim to neutral immunity.
2. Neutrals may establish themselves, for the purposes of trade, in ports convenient to either belligerent; and may sell or transport to either such articles as either may wish to buy, subject to risks of capture for violation of blockade or for the conveyance of contraband to belligerent ports.
3. Goods of every description may be conveyed to neutral ports from neutral ports, if intended for actual discharge at a neutral port, and to be brought into the common stock of merchandise of such port; but voyages from neutral ports intended for belligerent ports are not protected in respect to seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports.
4. Neutrals may convey to belligerent ports, not under blockade, whatever belligerents may desire to take, except contraband of war, which is

Statement of the case.

always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners, or of the master with the sanction of the owners.

5. Vessels conveying contraband cargo to belligerent ports not under blockade, under circumstances of fraud or bad faith, or cargo of any description to belligerent ports under blockade, are liable to seizure and condemnation from the commencement to the end of the voyage.
6. A voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports; and whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose.
7. Destination alone justifies seizure and condemnation of ship and cargo in voyage to ports under blockade; and such destination justifies equally seizure of contraband in voyage to ports not under blockade; but, in the last case, ship and cargo not contraband are free from seizure, except in cases of fraud or bad faith.
8. Circumstances, such as selection of master, control in lading and destination, instructions for conduct of voyage, and other like acts of ownership by an enemy, may *repel*, in the absence of charter-party or other explanation, presumptions of ownership in a neutral arising from registry or other documents, and will warrant condemnation of a ship captured in the employment of enemies as enemy property.
9. Spoliation of papers, at the time of capture, under instructions and without explanation by production of the instructions, or otherwise, warrants the most unfavorable inferences as to employment, destination, and ownership of the captured vessel.

APPEAL from a decree made by the District Court for the Eastern District of Pennsylvania, regarding the steamship Bermuda and her cargo, captured during the rebellion by the government war-vessel Mercedita, and sent into Phila delphia, and libelled there and proceeded on in prize.

The allegations of the captors were, that the vessel was enemy's property, and with her cargo—largely composed of munitions of war—had been intending, either directly or by transshipment, to break the blockade, then established by our government, of the southern coast, and that both she and her cargo were, on these and other grounds, subject to be captured and condemned.

The case was interesting, partly from the value, larger than common, of the ship and cargo, but more particularly

from the fact, that while many and strong indications of a general sort pointed at once to the truth of the allegations of the captors, blockade-running had been brought, by our adventurous English kinsfolk, during the Southern rebellion, to so much of a science; true purposes, by the aid of intermediate neutral ports of their own, had come to be so very well disguised; the final general destination of the cargo in this particular voyage was left so skilfully open, and the capture was so confessedly in neutral neighborhoods, that it was not quite easy to prove, with that certainty which American courts require, the intention, which it seemed plain must have really existed. Thus to prove it, required that truth should be collated from a variety of sources, darkened or disguised; from others opened as the cause advanced, and by accident only; from coincidences undesigned, and facts that were circumstantial. Collocations and comparisons, in short, brought largely their collective force in aid of evidences that were more direct.

The history of things, as they appeared on one side and on the other respectively, was in substance thus:

On the captor's side. The vessel herself had been built at Stockton-upon-Tees, in 1861. In August of that year, a certain Edwin Haigh made the declaration of ownership required by the British Merchants' Shipping Act of 1854. He described himself as a "natural born British subject," of Liverpool, "and *entitled to be registered* as owner;" swearing, according to the usual form, that no other person "*qualified* to be owner of *British* ships is entitled as owner to any interest whatever."* E. L. Tessier, a South Carolinian,

* It was, perhaps, a noteworthy fact that, in most of the affidavits, &c., about the ownership, the language was of a sort that did not necessarily involve an unqualified assertion of real and equitable ownership, as distinguished from the legal title and ownership on the registry, which the British statutes, like our own, largely look to. One of the documents, for example, said: "Your memorialist is a British subject and sole *registered* owner" of the ship Bermuda, &c. In another, Mr. Haigh styles himself, "shipowner and merchant." In another, he thought that certain contraband things found on board should not affect his position "*as* owner of the vessel," &c. &c.

was stated to be master of the ship. It was not denied that Haigh was a British subject. On the day after her registry, as appeared by a document from the Liverpool customs, entitled, "Certified Copy, Transaction subsequent to registry," Haigh executed a power of attorney, or "certificate," as it was called, to Allan Stuart Hencle and George Alfred Trenholm, both *of Charleston, South Carolina*, merchants, "jointly or severally to sell the ship, at any place out of the kingdom, for *any sum he or they may deem sufficient*, within *twelve months* from the date of the certificate." There was no evidence that this power had ever been revoked or returned.

Trenholm was a member of the firm of Frazer, Trenholm & Co., of Liverpool, a firm which, with its branch house, John Frazer & Co., of Charleston, was one of the firms most largely engaged in rendering aid to and sustaining the rebellion, by fitting out blockade-runners, and corsairs to injure American commerce. They were also the disbursing agents of the rebel confederation in England, and they had several vessels, the Ella, Helen, Herald, Economist, Albert, and others, forming a sort of "line" between Liverpool and Charleston, which carried on blockade-running, with the aid of agents at Bermuda and Nassau, N. P., intermediate British neutral isles. The firm was composed of Frazer & Trenholm, as also of a certain Prioleau, one Welsman, and a *J. R. Armstrong;* the first four being South Carolinians; and the last, alone, a British subject.

In possession of the registry and power of sale already mentioned, the Bermuda sailed for Charleston, then a port in rebellion and under blockade, in August, 1861. For some reason not stated, and inferable only, she ran into Savannah instead—a port also in rebellion and under blockade—running out again and back to Liverpool in the autumn of that year. Her master was now changed. Captain Tessier was transferred to the Bahama, which afterwards became notorious in the United States as having carried armament to the rebel corsair Alabama, sunk off the coast of Normandy by the United States ship of war Kearsarge. A certain Westendorff was put on the Bermuda. The British

statutes, however, requiring a recommendation to authorize a license to any one as captain, *Frazer, Trenholm & Co.*, in December, 1861, declared that they had known Westendorff for ten years; that he served under an experienced ship-master, sailing out of *Charleston*, and that he had afterwards commanded one of *their* ships. Among these was the Helen, a blockade-runner. Westendorff was, accordingly, legally licensed by the British merchant authorities captain of the Bermuda.

By the practice of the British ports, it is usual to indorse the address of the captain licensed on the back of his certificate of license. This indorsement on Captain Westendorff's ran thus:

"*Address of bearer:* Messrs. Frazer, Trenholm & Co., Liverpool."

Being brought round from West Hartlepool, on the east coast of England, the Bermuda now prepared for another voyage. Ostensibly it was to Bermuda. The cargo consisted of various things, some of which would have been useful enough at Bermuda, but which—cut off as the place had been by the blockade from commerce—were supremely desired at Charleston; such as tea, coffee, drugs, surgical instruments, shoes, boots, leather, saddlery, &c. Among the dry-goods were five cases of lawns, each having a card upon it, representing a youth gallantly mounting a parapet, and bearing onward the "FLAG OF THE CONFEDERATE STATES," which in all its colors was spread to the breeze.

There were found, also, several cases of military decorations, &c.; epaulettes for all grades; stars for the shoulder-straps of officers of rank; bugles, crossed swords and cannons for different sorts of cap fronts; swords for staff and line officers; *chapeaux de bras;* embroidered wreaths, "without U. S. on;"* various sizes of military buttons for coats and vests; some with the palmetto tree; belts with the same designations; other buttons and belts with the letters S. C.; L.;† T.;‡ &c., and with eagles surrounded by *eleven*

* So labelled. † Louisiana? ‡ Texas, or Tennessee?

stars; palmetto trees embroidered on blue cloth, &c.; sash buckles, with the arms of Georgia, of South Carolina, &c.

Among the cargo were several cases of cutlery, which was stamped as

"Manufactured expressly for John Treanor & Nephew, Savannah, Ga."

It embraced a variety of articles, stamped with portraits and legends, thus:

"JEFF. DAVIS,

OUR FIRST PRESIDENT.

The right man in the right place."

Others presented a military figure, emblazoned

"GENERAL BEAUREGARD.

He lives to conquer."

Others represented a bull running after a man, with soldiers chasing; and over the bull this motto:

"ON TO WASHINGTON! BULL RUN."

The blades of these were stamped,

"Courtney & Tenant, Charleston, S. C."

Several cases of double-barrelled guns were found, stamped as

"Manufactured for J. E. Adger, of Charleston."

There was also a large amount of munitions of war; five finished Blakely cannon in cases, with carriages; six cannon —some cast, some wrought—not in cases; some thousand shells, varying from seven to a hundred and twelve pounds each, and fuses for them. Three hundred barrels, seventy-eight half-barrels, and two hundred and eighty-three quarter-barrels of gunpowder, seven hundred bags of saltpetre; seventy-two thousand cartridges, two and a half million percussion caps, two cases of Enfield rifles, twenty-one cases of swords, marked N. D. (navy department?), seven cases of pistols, and a variety of like or accessory things; in all about eighty tons weight. In addition to these was a large amount of army blankets, army cloths, kerseys, vulcanized cloth, with fifteen hundred yards of adhesive plaster; these last large enough to be invoiced at $62,500.

Numerous letters of friendship and business were found

in the vessel from people abroad to different persons in the rebel States, Mrs. Trapman, Mrs. Trenholm, Mrs. Rose, Mr. T. M. Hencle, Mr. C. F. Hencle, Mr. John Hencle, &c.; also five numbers of the Times, sent by some person in England to his friend in the South; also a book by one Spence, published by Richard Bentley, New Burlington Street, London, showing the bad effects which the American Union had had on the national character and policy, and that "secession" was "a constitutional right;" several passages being marked *in margine*, apparently as if to invite attention specially to them.

A few memoranda, also, were found aboard;—requests apparently from persons in Charleston to Captain Westendorff to buy things for them in England, and bring them through the blockade. A part of one may serve for illustration;—it having been evidently by some lady.

MEMORANDUM.

"CHARLESTON, 18

2 pair ladies' kid gloves, silver-gray color.
2 " " " tea color. } Best quality.
2 " " " ashes of rose, light and dark. } Size 6¾.
2 " " gaiters, *best kid*, stout soles, *soft* upper, 3½ full.
1 ladies' parasol, best silk, color drab or ashes of rose.
¼ pound black sewing silk, fine. If it can be had of mixed colors, get ¼ pound of best qualities.
1 pair lady's scissors, ordinary size, and some needles of best make. M. S. D.

Get the best quality of everything."

One of the memoranda, which like the other was a lady's, and contained an order for gloves,—"dark-colored kid"—concludes:

"May God bless Captain W., and protect him, and bring him in safety back to his family, church, and friends, is our prayer for him."

On the vessel were several persons, called in various let-

ters "government passengers;" being in fact "artists" sent from Scotland. An account of them was given in certain letters found on the vessel: some addressed to a certain Mr. Morris, "*lithographer*," in Charleston, who it appears had safely ran the blockade not long before. In different parts they ran thus:

STATIONERY DEPARTMENT,
80 BISHOPSGATE WITHIN, 26 LEADENHALL STREET,
LONDON, February 12, 1862.

DEAR MORRIS:

I was very much pleased to hear that you managed to escape the vigilance of the Yankee vessels in getting into Charleston, and from the accounts I have heard, should think you had a *very narrow escape*.

A commissioner (Major Ficklin) from the Confederate government has been over here, and has sent a lot of printers and engravers, and presses, and paraphernalia complete, which he obtained from Scotland. He served me very shabbily and ungentlemanlike. I had many interviews with him, and gave him all necessary information; furnished him with a list of requirements, compromising myself with several workmen, and put myself to many inconveniences. He admitted my price being proper and correct, and led me to believe he would give me his order, but *having got out of me all he could*, he then intrusted the order with another house. I hardly think that fair, after promising to trust me with it and within a few weeks of its execution.

We, in England, do not think the North can hold on much longer, the financial state being such as to induce us to hope that two or three months will settle your present deplorable state.

We inclose our catalogue, which may guide you; and we make and can buy paper of all kinds as well as any London house; so could execute your order for foolscap loan paper, with watermark C. S. A., as shipped you, at 42*s*. per ream double, equalling two reams single.

Trusting soon to hear of you, I am yours,

C. STRAKER.

This "lot of printers and engravers" which Major Ficklin had obtained in Scotland, embarked, under the charge of one George Dunn, on the Bermuda, on this voyage, the whole

party being entered on the crew list as common sailors. They appeared to have taken their "paraphernalia complete" with them. There were at least 26 boxes marked P. O. D. (post-office department?), with immense numbers of "Confederate States" postage stamps; "printing ink for postage stamps;" copper-plates with 400 dies for printing at each impression 400 rebel postage stamps; also 200,000 letter envelopes; some "American-shape," "official blue," &c.; many reams of fine white bank-note paper, watermarked

C. S. A.

intended obviously for "Confederate States" bank notes or bonds—"foolscap-loan-paper;" and the same apparently which is referred to and so styled in the concluding paragraph of the letter of Mr. C. Straker, of London, to his friend and correspondent Morris, quoted on the preceding page, "as shipped you at 42*s.* per ream double, equalling two reams single." All this stationery having gone with the captured vessel to the port of Philadelphia, was there sold.

So among the persons that embarked on the Bermuda, at Liverpool, were certain gentlemen, residents of Charleston, but perfectly well known in circles of gentility, both North and South, before the rebellion began. Among these, as was specially noted by the counsel of the captors, was the late amiable Mr. John Julius Pringle, a well-known gentleman of education and fortune, resident in South Carolina during the winter, but at Newport, Rhode Island, in summer. Mr. Pringle, with his two sons, Mr. Joel Poinsett Pringle and Mr. John Julius Pringle, Jr., with Mr. Arthur Huger, all of whom the rebellion found in Europe, and whose unquestionable wish and purpose was to return to the South, were entered on the shipping list as common sailors, and by disguised names. The nature of a shipping list and some of the regulations under which as ordinary seamen [O. S.] these gentlemen came, appear by presenting original instruments themselves. The gentlemen's names on the list are in italics.

Statement of the case: Captors' side.

AGREEMENT FOR FOREIGN-GOING SHIPS.

NAME OF SHIP.	OFFICIAL NUMBER.	NAME OF MASTER.	DATE OF AGREEMENT.
Bermuda.	42,608	C. W. Westendorff.	22 February, 1862.

SIGNATURE OF CREW.	Age.	Where born.	Ship in which he last served.	In what capacity engaged.	Time at which he is to be on board.	Amount of wages per calendar month, share, or voyage.	Shipping master's signature or initials.
John Dempsey,	15	Dublin,	Demetrius, London,	Boy,	25 Feb.	1 0 0	T. Cushman
Thomas Willott,	16	Liverpool,	Holyhead, Bath,	Asst cook,	25 Feb.	1 10 0	T. C.
Peter Johsen,	22	Copenhagen,	Northern Crown,	A. B.,	25 Feb.	2 10 0	T. C.
John Richardson,	25	Derham,	Bermuda, Liverpool,	Fireman,	25 Feb.	4 0 0	T. C.
Wm. Geo. Embleton,	29	Richmond,	First Voyage,	O. S.,	25 Feb.	0 10 0	T. C.
John Isard,	52	Charleston,	First Voyage,	O. S.,	26 Feb.	0 1 0	T. C.
John Julius,	19	Charleston,	First Voyage,	O. S.,	26 Feb.	0 1 0	T. C.
Joel Poinsett,	18	Georgetown,	First Voyage,	O. S.,	26 Feb.	0 1 0	T. C.
Henry Arthur,	19	Savannah,	First Voyage,	O. S.,	26 Feb.	0 1 0	T. C.
&c., &c.,	&c.,	&c., &c.,	&c., &c.,	&c.,	&c.,	&c.,	&c.

Statement of the case: Captors' side.

REGULATIONS FOR MAINTAINING DISCIPLINE,

Sanctioned by the Board of Trade, in pursuance of the Merchants' Shipping Act, 17 & 18 *Vict. c.* 104.

No.	Offence.	Amount of fine or punishment.	Shipping master's signature or initials.
1	Quarrelling, or provoking to quarrel, .	One day's pay.	T. OSBORNE.
2	Swearing, or using improper language,	One day's pay.	
3	Carrying a sheath-knife, ...	One day's pay.	
4	Drunkenness. First offence, ...	Two days' half allowance provisions.	
5	" Second offence, . . .	Two days' pay.	
6	Not attending divine service on Sunday, unless prevented by sickness or duty of the ship, ...	One day's pay.	
7	Interrupting divine service by indecorous conduct, ...	One day's pay.	All adopted.
8	Not being cleaned, shaved, and washed on Sundays, ...	One day's pay.	
9	Washing clothes on a Sunday, ...	One day's pay.	
10	Secreting contraband goods on board, with intent to smuggle, ...	One month's pay.	

Of the ship's real company, the master, Westendorff, the first mate, and the master's brother (calling himself and shipped as a hand, but acting as clerk) and three seamen, were citizens of South Carolina; and the second mate, the carpenter, and cook belonged to other States in rebellion.

There were forty-five bills of lading, of which thirty-one were for goods shipped by Fraser, Trenholm & Co. The whole of the cargo was shipped under their direction; and according to the bills of lading it was to be delivered at Bermuda, "*unto order or assigns.*" No consignees were named on the bills.

Several of the persons connected with the ship or otherwise, and who were examined *in preparatorio*, appeared to regard her as owned by Fraser, Trenholm & Co. Thus the chief engineer, when thus asked to whom she belonged, answered: "To the best of my knowledge, Fraser, Trenholm & Co. are the owners." Heenan, a fireman, said: "I have understood that Fraser, Trenholm & Co. are the owners." Noble, another fireman: "The owners of the captured vessel, to the best of my knowledge and belief, are Fraser, Trenholm & Co." And Pierson, a third one, said:

Statement of the case: Captors' side.

"At Liverpool, it was the common talk that Fraser, Trenholm & Co., of Liverpool, owned the captured vessel." A letter of one of the mates, found on board and written to some friend,* seemed to speak of them in the same way. So, too, Tessier, the old captain, writes to Westendorff, his successor, thus:

STOCKTON-ON-TEES, 20th Feb., 1862.

DEAR WESTENDORFF:

Will you do me a favor? Opposite the Brumley Moore Dock wall there is a boot-maker of the name of Warner. As you are passing by, will you have the kindness to step in and inquire whether a pair of sea-boots I ordered have been sent to the office of *our owners*. If they have, please request Mr. Griffiths, head-porter of *Frazer, Trenholm & Co.*, to forward them to me.

Captain Mitchell must have had a trying time since he sailed. I hope he kept her well to the southward after leaving the channel. To take the H. [erald?] across the Atlantic, at this season, will require some working.

With sincerest regards, I remain ever yours respectfully,

E. L. TESSIER.

Certain *correspondence* between Fraser, Trenholm & Co. and their branch house, &c., was specially relied on by the captors to show that the British subject Haigh was not the owner, and that the firm of Fraser, Trenholm & Co. was. Thus it appeared that, on the 16th of January, 1862, the Liverpool house of Fraser, Trenholm & Co. write to the Charleston branch, John Fraser & Co., that they had despatched the ship "Ella" with a cargo to Butterfield, Bermuda, and that she would be followed by the steamer Bermuda with goods.

They now write as follows:

["Ella."]

LIVERPOOL, 23d January, 1862.

MESSRS. JNO. FRASER & Co., Charleston.

DEAR FRIENDS: Referring to our respects of 16th inst., we now hand inclosed bills lading of the cargo per ship Ella, and copies of invoices.

* See *infra*, p. 528. "*I have seen the owners.* All fudge what he told me. *Mr. Preleau* (*principal man*) *came up to me,*" &c.

These goods are all shipped by our friends here; *but the disposition of them there is left entirely to you, and in any market to which you may please to direct them.*

The bills of lading are indorsed to your order, or that of your authorized agent. Captain Carter is an intelligent shipmaster, and we believe a good man of business; any communication for him, if you do not find it expedient to send an agent to Bermuda, should be sent under cover to Mr. N. T. Butterfield, Hamilton, Bermuda. Captain Carter is instructed to proceed to Bermuda, and there await your instructions. The ship is now in the river ready for sea.

The "Albert" sailed yesterday for Nassau, and will proceed, after landing her cargo, to Rio for a cargo of coffee, with which she is to return to Nassau *for orders.*

We remain yours, very truly,

FRASER, TRENHOLM & Co.

["Bermuda."]

LIVERPOOL, 28th February, 1862.

MESSRS. JNO. FRASER & Co.,
(or their authorized agent,)
Hamilton, Bermuda.

DEAR SIRS: The letters we have written by this opportunity, with invoices and bills of lading of the cargo of the ship, are very full in every particular, and we think will greatly facilitate the delivery *and also the transshipment*, should this be determined upon. *We think that care should be taken to prevent the loss of any of the invoices or bills of lading;* but should this *unfortunately* happen, duplicates can be furnished hereafter, which would, however, involve much delay and great inconvenience in the delivery of the goods; and without the invoices there would necessarily be much embarrassment in effecting sales.

In case of there being an opportunity of sending the letters forward with the invoices and bills of lading, *we cannot too strongly impress upon you the adoption of the most certain means of preventing any of them falling into improper hands.*

Yours, truly,

FRASER, TRENHOLM & Co.

On the 1st of April, 1862, the Charleston house write to Butterfield thus, having by previous letter informed him of

their being advised that the Ella was despatched, and that she would be *followed by the Bermuda.*

CHARLESTON, April 1, 1862.

DEAR SIR:

We suppose that the steamer Bermuda may be with you ere this; and the ship Ella.

We will thank you to request the masters to act as follows, viz.:

Captain Westendorff to take in the tea and other light articles per Ella (if he has room for them), and proceed to Nassau, reporting himself, on arrival there, to Messrs. Hy. Adderly & Co.

Captain Carter to keep in his cargo and wait further orders from us. They will reach him, we think, very shortly.

Yours respectfully,

JNO. FRASER & Co.

N. T. BUTTERFIELD, Esq.,
Hamilton, Bermuda.

Butterfield, who received this letter nineteen days after it was written, immediately sent it to Captain Westendorff, at St. George's. Westendorff acted on it at once. He took the new articles aboard, and the artists having got out from his ship—though he refused, as involving him in too great a responsibility in the face of his new orders, to deliver to Dunn the printing-presses and working apparatus consigned with the party under him to Bermuda—he proceeded from St. George's towards Nassau, on the 23d of April. Mr. Pringle and the other South Carolina gentlemen were aboard. On the 27th the vessel was captured. He had arrived at Bermuda on the 19th March, and was accordingly there about five weeks. His cargo was not touched while there.

Among the papers taken on board the Bermuda was an unfinished letter, without signature, and apparently written by an engineer of the Bermuda to a friend (another engineer it was said) at Stockton-upon-Tees. It ran thus:

LIVERPOOL, WELLINGTON DOCK, February 16, 1862.

MR. A. GRAY, Stockton-on-Tees:

We are all the talk of Liverpool at present, taking in those large rifled cannon (without cases), and large lots of ammunition

and materials of war. In American circles our fate is discussed pretty freely; they have us taken, imprisoned, and hung already. Our Hartlepool friend, Mr. Detective Maguire,* has got a job *here* again; is regularly to be seen on the quay, to take a look of what is going on board. They put the custom-house inspectors to a great deal of trouble, because they are coming down every day, opening boxes and cases—to satisfy J——. The inspector said to me yesterday, that there existed great jealousy on account of our cargo; but fortunately they cannot stop us. We are on a lawful voyage; people won't believe it here; they are bound to think we are for running the blockade again.

Our tender left yesterday; *don't be at all surprised we have got a tender;* they bought a light draft-boat at Dublin, used to run the mail once, called the Herald; length, 280 feet; deep water line, 10 feet; light, 5½; side-width, 225; horse, nominal, used to press up to 28 pounds; got her boilers stayed, strengthened, and soforth; strains up to 20 pounds now; average speed, 18½ knots per hour; razeed all her lower cabins, to make cargo space; shipped crew for twelve months, for some port or ports south of Mason and Dixon's line. Three captains on board; one an Englishman, nominal; another, an experienced coast pilot from the Potomac to Charleston; another, ditto, ditto, from Charleston to the San Juan River in Texas. If the Yankees reach her, they are smarter than I give them credit for. *She awaits our arrival in Bermuda;* goes *first into Charleston*, though, *to see about the stone fleet.* Don't tell Tessier I gave you the information; he'll write straight to the owners, and tell them I am a traitor, and blabber out secrets; I know him. I have seen the owners; all fudge what he told me. Mr. Prelean (principal man) came up to me; shook hands; said was glad to see me. I said, I hope I didn't incur your displeasure by remaining in the Bermuda. *Answer.* Not at all.

The record showed that, after his arrival at Bermuda, Mitchell, captain of the Herald, drew a bill on Fraser, Trenholm & Co., at Liverpool, in favor of Westendorff, captain

* This was obviously a person employed by the United States, to see what vessels were engaged in giving aid to the rebellion. He had been watching, it appears, the vessel before she was brought round to Liverpool. —REP.

of the Bermuda, for £258, to be charged to the account of the Herald; showing that Captain Westendorff advanced to the Herald that amount.

So to one Farrelly, a person on the Bermuda, and apparently a candid, though not a much educated witness, testified:

"At Bermuda there was a steamer called the Herald, which we understood was intended to run the blockade; but the captain who brought the steamer out from England refused to run it. The talk at Bermuda was that there were other captains on board the Herald, and that they were trying to get one of these captains in command. It was also the talk that the Herald was connected with our ship."

At the time of the capture, and after the vessel was boarded, the captain's brother, by his order, threw overboard two small boxes and a package, which he swore that he understood contained postage-stamps, and a bag, which he understood contained letters, *and which he was instructed to destroy in case of capture.* Mr. Huger also destroyed a number of letters, which he swore were private letters, intrusted to him by Americans in Europe.

Such essentially was the case on the captors' side.

On the other side the case existed thus:

As to the place where the vessel was captured.—When captured, the Bermuda was not far from the eastern coast of Great Abaco Island, an English colony, and steering along the coast, *not* in the route to any of *our* ports, but in a southwestwardly direction, and, as was *alleged*, between Abaco and Eleuthera (another English island), to New Providence (Nassau), a third English colony. She was captured within sight of British land, within the range of the Abaco light. The distance was from five to seven miles from the shore; exactly how far was not sufficiently shown. The British flag was flying at the time of the capture, and was not hauled down until the prize was taken a distance of twenty or thirty miles further out to sea. There was, perhaps, but slight evidence,

certainly slight *direct* evidence, to show that her *immediate* destination was to any blockaded port. Being on the eastern side of the Bahama group, she was, in a straight line, as was *said at the bar*, 160 miles from Florida, 410 miles from Savannah, 480 miles from Charleston, and 480 miles from Wilmington, N. C. The Mercedita was cruising near the Abaco entrance to Nassau; and it was asserted, and perhaps rather made to appear, that orders had at one time been given, or rather, maybe, understood to be given, to capture the Bermuda *wherever found* on the high seas between England and the United States. A previous conclusion, derived from our agents in England and from trustworthy evidence, quietly collected by orders of our government, had possibly existed on the part of the government that the vessel was built for the very purpose of running the blockade.*

As to ownership.—Haigh, who had been desirous to make the British government interpose, as for a capture within neutral territory, and who had made claim in the court below as owner, in a paper prepared by him to induce the British government to interfere, swore that *he* was "the sole registered owner" of the vessel; that she was bound to Bermuda, with instructions to deliver her cargo there to one N. T. Butterfield, and to ship a homeward cargo for Great Britain; that it was "*not* intended that she should attempt to break the blockade," &c.; that, on the arrival of the ship at Bermuda, the consignee of the cargo was desirous that it should be carried to Nassau, and made an arrangement with the master to have it carried with some additional cargo, the particulars of which he, Haigh, had not been informed of.

So Captain Westendorff, in previously asking to make claim to the vessel and cargo for the parties whom he asserted were interested, swore that Haigh was "the true, lawful, and *bona fide* owner" of the vessel, and that no other person was owner of or *interested* in her; and that the vessel had no destination either for herself or cargo when she left Liverpool, except for Bermuda in the first instance, and ulti-

* See *supra*, p. 528.

mately for Nassau; that he, the captain, was directed to receive instructions and place himself under the care of N. T. Butterfield, of Hamilton, in the island of Bermuda named;* that the cargo was shipped and owned by British subjects and on British account, and not for or on account of or for the use of any person in the insurrectionary States; and that, if restored, it would belong to British subjects, and not to them; and that neither vessel nor cargo, nor any part of it, was intended for the insurgents; and that the vessel did not intend to violate the blockade anywhere. *His affidavit was as direct and full as possible.*

So Armstrong, the British partner in the firm of Trenholm, Fraser & Co., by writing filed, swore that "the said firm, acting as agents for Mr. Edwin Haigh, owner of the British ship Bermuda, procured for her from various shippers a full cargo;" that the steamer sailed hence for Bermuda; that the cargo laden here was intended to be discharged at Bermuda or Nassau; and that a return cargo had been provided by her consignees at Nassau; that the general management of the steamer had been placed in the hands of his firm "by the owner," but that no charter-party was entered into, "this not being customary under such circumstances."

As to intent to run the blockade.—In addition to what was above sworn, Harris, a member of the firm of Adderly & Co., in Nassau (the correspondents of Fraser, Trenholm & Co.), declared, on oath, that when the Bermuda was consigned to them from the island of Bermuda, the instructions then given to them were, that, on the arrival of the ship at Nassau, the cargo laden on her should be *landed*, and the ship again laden with a cargo to be delivered at some *port in Europe;* and he swore "that it was the intention of the firm of Adderly & Co. to carry out *strictly* these instructions, and that there was never any intention that the ship should run the blockade of any of the southern ports of America; but

* See, however, the letter of instructions, *infra*, p. 535.

that the vessel, at the time when she was taken and captured, was, so far as the instructions of the firm went, in the *bona fide* prosecution of a voyage from the island of Bermuda to *these islands*, with a cargo which was to be delivered *here*."

As respected the power of attorney, or "certificate," to sell, Haïgh, in a letter, "*per J. R. A.*," to his agent at Philadelphia, represented, by way of explanation, that "it was given on the *first* voyage of the Bermuda, as would be seen by the date, and was intended to apply to *that only*." "On the vessel's return," he adds, "I endeavored to sell her, but could neither do this nor cancel the power until the document was returned from Charleston, whither it had been sent. *This* my agents have hitherto failed to do, owing, seemingly, to the interruption of communications."

"The registry of such power of attorney," he concluded, "is compulsory, and a copy can be obtained from the customs authorities by any one who pays the trifling fee necessary."

In another paper he gave an account thus:

"In August, 1861, being then the sole registered owner of the steamship Bermuda, I was in hopes that the blockade imposed by the Northern government of the United States against the southern ports might be raised by reason of intervention, arrangement, or otherwise, and I accordingly caused the said steamship to be sent on a voyage to Charleston, in South Carolina.

"I was also desirous that the said steamship should be sold at Charleston, or any other port of the United States, if the opportunity should offer and a sufficient price could be got for her. I accordingly executed a certificate of sale authorizing Mr. Hanckel and Mr. Trenholm, of Charleston, jointly or severally, to carry into effect any desirable sale.

"I am informed and believe that the said steamship, in the prosecution of her voyage, was not warned off by any of the blockading cruisers, and that she entered the port of Savannah without meeting with any of such cruisers, or having the opportunity of ascertaining whether the said blockade was in fact still in force, and there discharged her cargo.

"In the month of January last the ship returned to England without having been sold, but the certificate of sale was not returned to me.

"In the month of February last, 1862, seeing that the blockade had become effective, and that there was little hope of its being raised, I caused the ship to be loaded for Bermuda or Nassau; and, as there was no intention of the said ship entering any of the blockaded ports, I caused application to be made to the registrar of shipping at Liverpool, to grant a new certificate of sale to some parties at Bermuda or Nassau, with a view to her sale at either of those British ports; but the said registrar declined to issue such new certificate unless the old certificate should be first given up to him cancelled.

"The old certificate has never been returned to me, probably by reason of the difficulty of communication between the Southern States and Great Britain; but it was virtually revoked and annulled in the month of February last, all intention of entering any of the Southern ports of the United States being then abandoned.

"EDWIN HAIGH."

In regard to the munitions of war, Blakely, late a captain in her Majesty's service, but who was now "a cannon manufacturer and merchant," swore that in shipping the cannon, shells, fuses, limbers, &c., aboard, which, it appeared, was his part of the cargo (and which he interposed in the District Court to claim), he intended part for the government of Hayti and the rest "for sale at Bermuda or Nassau, in the usual course of business, to any person willing to purchase the same;" that he had shipped the goods for Bermuda in the first instance, the steamer being bound for that port, but having been informed that Nassau, N. P., offered better opportunities, he desired them to be forwarded thence to Nassau, instructing his friends there, the Messrs. Adderly & Son, to sell those not intended for Hayti "to any persons willing to become purchasers, whether Federals, Confederates, or others, according to the prices which they might respectively offer."

[Captain Blakely, however, did not, nor did the Messrs.

Adderly, though they made oaths in the case,* produce either originals or copies of these letters.]

It is to be noted, also, that the cargo was by no means confined to munitions of war and such articles already mentioned as were plainly destined for the rebel States. A large part of it consisted of British dry goods and of groceries generally.

As respected the "government passengers" (the engravers or artists), who undoubtedly wished to run the blockade and get to Charleston, it appeared that they all got out at Bermuda, and that none of them rejoined the vessel when she went to Nassau.

So in regard to Mr. Pringle and the South Carolina gentlemen, registered by disguised names as common sailors, and brought under obligation not to quarrel, swear, carry sheath knives, interrupt divine service by indecorous conduct, &c., &c., under penalty of forfeiting more or less pay, the explanation given by Captain Westendorff was, that when they expressed their wish to embark he was on the point of sailing; and that they were put on the crew list in order to get round the British statutes, which required that before a vessel took passengers she should be inspected; an operation which would have required a week's time. All these gentlemen swore that they knew of no purpose on the vessel's part to violate the blockade. The testimony of Mr. Pringle was positive about this.

To the fifth interrogatory, *in preparatorio*, he answered as follows:

"The said vessel sailed from Liverpool on her present voyage and was bound to Bermuda *alone*, and *was not to run any blockade*; so I was *assured* by the agents, the Messrs. Fraser, Trenholm & Co., of Liverpool, who are a branch house, I believe, of John Fraser & Co., of Charleston, S. C."

All the gentlemen, and several of the artists, in fact, while testifying distinctly their wish and intention to get

* See *supra*, p. 581.

into the Southern States, testified that they did not expect to get there on this vessel. Indeed, on arriving at Bermuda, they prepared and offered to the captain

A TESTIMONIAL OF PARTING THANKS.

"ON BOARD THE STEAMSHIP BERMUDA,
20th March, 1862.

"DEAR SIR: The undersigned, passengers on board your vessel from Liverpool to Bermuda, beg leave, before parting with you, to express their thanks for the kind treatment and unceasing attention which we have received at your hands. Your efforts to add to our comfort and make our time pass pleasantly has served in a great measure to destroy the monotony of a sea voyage. We also take much pleasure in assuring you that the strict attention we have observed you paid to the management of your fine ship has been such as to make us feel always a perfect security and confidence under your care. With our best wishes for your future prosperity,

We are, dear sir, yours, respectfully,

J. J. PRINGLE,	W. E. SPARKMAN,
GEORGE DUNN,	WM. G. EMBLETON,
JAMES MCHUGH,	P. GELLATLY,
GEORGE HENRY KEELING,	J. MCFARLAND,
J. J. PRINGLE, JR.,	ARTHUR HUGER,
J. POINSETT PRINGLE,	JNO. GEMMELL."

It was not pretended that any of these passengers had concealed their true character from the captain, or in any way changed at any time their ordinary dress; or that they had made concealments of any sort.

The following, in material parts, was the letter of instructions, which, when the vessel set sail from Liverpool, the captain received:

"LIVERPOOL, 28th February, 1862.

"CAPTAIN C. W. WESTENDORFF,
Steamship Bermuda.

"DEAR SIR: You will proceed hence to the port of *Hamilton, Bermuda*, and *there* deliver your cargo, as per bills of lading.

Inclosed is a letter of introduction to Mr. N. T. Butterfield, who will assist you in the purchase of coals and in the disbursements of your ship. The bills inclosed (£500) on the Bank of Liverpool, will furnish you the means of paying your disbursements in Bermuda.

"Instructions will follow you as to a return cargo for your ship. If you should have any surplus funds after paying the accounts of the ship, you will bring them in *British gold;* but should you require more money than the bills herewith will furnish you, we authorize you to value upon us at short sight for what may be wanted, and Mr. Butterfield will assist you in negotiating your bill upon us.

"Our friends in St. John, N. B., are Messrs. W. & R. Wright, and in Nassau, N. P., Messrs. Henry Adderly & Co.; and *in case of having to take cargo from Bermuda to either of these ports*, you will call upon them.

"We are, dear sir, yours truly,

"FRASER, TRENHOLM & Co.,

"Agents of the owner."

There was no concealment, apparently, as to anything on board. Everything was fairly entered on the bills of lading and manifest. The crew were shipped, it seemed, for a term not exceeding twelve months, from Liverpool to Bermuda, thence, if required, to any ports or places in the West Indies, British North America, *United States*, and back to the United Kingdom. The wages, if fairly set down, seemed to be at a rate not exceeding that of ordinary voyages in peaceful times, without special risk.

The court below condemned the vessel and the part of her cargo which consisted of munitions of war; reserving judgment as to the rest. Appeals were now taken here by Mr. Haigh and Captain Blakely. The case was twice elaborately and very well argued, both on reason and authorities, once at the last term and again at this.

Mr. G. M. Wharton and Mr. W. B. Reed, on both arguments, for these appellants: There is really no sufficient evidence of enemy ownership of the vessel. Such ownership is denied positively by numerous respectable persons on oath. The

control which John Fraser & Co., of Charleston, had over the voyage of the ship, did not clothe them with any ownership, even in a prize court. That control must be treated as confined to a direction of the ship within the limits of her prescribed voyage, and if that voyage did not include a trip to any blockaded port, or to any port of the enemies of the United States, it cannot affect injuriously the neutral owners. The power of attorney from Mr. Haigh, was not accompanied with any interest in the attorney. Any sale under it must have been for the use of the principal, and all money received under it would have been the funds of the principal. The power had no reference to the then voyage of the Bermuda. It was an unexecuted one and capable of revocation. If the Bermuda were not, on the voyage in question, destined to a Southern port, the execution of the power would either have been impracticable, or could only have been carried into effect through correspondents in some neutral territory.

Neither is there any sufficient evidence that the vessel meant to run the blockade. Her instructions were to go to Bermuda, to *deliver* her cargo there, and to bring back a return in British gold; and while there was a provision made for the possibility of carrying the cargo to Nassau, there was none for a destination beyond. The vessel was captured in her direct course to a port confessedly neutral. The artists, who, all admit wished to get to the Southern States, left the vessel when she got to Bermuda. They left her, because on *her* they could not get to our Southern States. Mr. Pringle, and his friends who embarked at Liverpool, it is as plain, originally expected to go on *this* vessel to Bermuda only; and though they went on her to Nassau afterwards, it was in the expectation of finding some other conveyance thence to Charleston. The testimony of Mr. Pringle, whose accuracy no one who knew him will question, is positive that the parties knew of no purpose to run the blockade. The unsigned letter attributed to an engineer of the Bermuda—and which will be relied on to support a condemnation—disproves intent to run a blockade. After saying that a detec-

tive was watching them, and that great jealousy existed on account of the cargo, it declares: "Fortunately they cannot stop us. *We* are on a *lawful* voyage. People won't believe it. They are bound to think we are for running the blockade." And this foregone conclusion about the Bermuda, which it seems was conveyed here by detectives when she was on the stocks, has been one of the worst impediments to justice in our case. The government had ordered the Bermuda to be captured wherever found.* It is assumed, without proof, that the vessel belonged to Fraser, Trenholm & Co.; and then inferred as an irresistible conclusion that they could not own any vessel and not set her to breaking a blockade.

It being impossible to fix unlawful enterprise on the Bermuda, it will be said that the purpose was to transship the Bermuda's cargo at Bermuda or Nassau? That is easy to conceive of and to suggest, and even to aver. But conception, suggestion, and even averment are of no weight. Does the evidence *prove* such a purpose? We say that it does not. It will be argued that the "Herald" was to perform this office for the Bermuda. The only thing which gives countenance to such an idea is the unsigned and not very trustworthy letter said to have been written by the Bermuda's engineer. The inference is a strained one which gets this purpose of the Herald from that scrawl; one which, moreover, declares on its face that the voyage on which the Bermuda was about to sail, was a "lawful voyage:" which, would it be if the Herald went as a tender to transship?

The one or two memoranda found on board and said to have been for Captain Westendorff are of the least possible significance. If there be anything in them which shows that they were orders to bring articles through the blockade—which there is not at all as respects the largest—there is assuredly nothing which proves that Captain Westendorff

* See correspondence of Lord Lyons and Mr. Seward, in August, 1862, after the capture, in which these general orders referring to a list were rescinded. (Parliamentary papers, No. 5, 1863.)

did execute them, or ever meant to execute them, especially to execute them for this voyage or by this ship.

That portions of the cargo—the cutlery, &c.—were intended to invite purchasers at Bermuda for the Southern States may be; but that does not prove enemy ownership in this vessel or her intent to run the blockade. The articles at best were but a fraction, and not a large one, of the cargo; and after having mingled with the stock of the commerce of Bermuda—or Nassau,—sold, *bonâ fide*, to British subjects there—would have found purchasers from the Southern States, of which class of persons the islands had many.

As to the cannon and other munitions of war—sent by Captain Blakely—his affidavit in explanation is clear, reasonable, and sufficient. Federals and Confederates to him were both alike. He was any man's customer in a war.

The fact that Mr. Pringle and his friends, as well as the artists, were entered on the crew list as sailors is abundantly explained by Captain Westendorff. They had not disguised themselves when captured; nor at any time. Indeed there was no concealment as to any part of the cargo. Everything was on the bills and manifests.

The counsel for the claimants then submitted these points of law, which they enlarged upon, enforced, and applied:

1. If the Bermuda were on a voyage, at the time of her capture, from the port of Bermuda, a neutral port, to the port of Nassau, another neutral port, being then a British vessel and owned by a British subject, she was not liable to capture. In order to render her so liable to capture, under these circumstances, she must have been actually on a voyage to Charleston, or some other blockaded port of the Southern States, with an intent to run the blockade.

2. There can be no legal blockade by a belligerent of any other than a hostile port. There can be none of a neutral port. The Bermuda was, therefore, at perfect liberty to navigate to and fro among the British West India islands,

so far as the question of blockade is concerned, unless she were actually on a voyage to a blockaded port of our country. No blockade of a Southern port could be lawfully extended so as to embrace the waters lying between or about the West India islands.

3. There can be no proper legal assertion of a continued voyage of which Nassau was but an intermediate port, unless the evidence shows (which it does not) that the Bermuda was on her way to a blockaded port, *viâ* Nassau. Every voyage must have a *terminus a quo* and a *terminus ad quem;* the latter of which, under the evidence, was a port of discharge in the United Kingdom; and no part of the evidence shows that the Bermuda herself was to proceed as a part of her voyage to any blockaded port. It was no breach of the blockade of any such port to intend to land her cargo, either at Bermuda or Nassau, even though some other vessel was afterwards to endeavor to carry on the cargo to Charleston, provided the Bermuda herself was to return to England.

4. What the voyage of the Bermuda was, is a question of fact to be deduced from all the evidence in the cause. The shipping articles which described it with particularity, are persuasive evidence of the voyage on which the Bermuda started from Liverpool. The letter of instructions to the captain at that place, is in accordance with the shipping articles. The legal construction of those documents is, that the violation of a blockade was not embraced by them; and that if, after arriving at Bermuda the ship should be ordered to a port of the United States, some open port, and not a blockaded port, must have been intended. The instruction to the captain which he received at Bermuda to proceed to Nassau, exhausted the power which the verbal charterers of the ship had over her; and after leaving Nassau under the terms of the voyage, she could only be brought back to the United Kingdom.

5. British merchants, as neutrals in our present war, had a perfect right to trade, even in military stores, between their own ports, and to sell at one of them, even to an enemy of

the United States, goods of all sorts, although with a knowledge that the purchaser bought them with a view of employing them afterwards out of the neutral territory in war against us. A neutral may sell in his own territory, to either belligerent, munitions of war; the only exception, so far as England and America are concerned, being a prohibition against fitting out vessels of war, or warlike expeditions, in the neutral country, against one of the belligerents.

6. The question of contraband of war cannot arise with respect to any portion of the Bermuda's cargo, unless she were on a voyage to a blockaded port. It is not necessary in law to show that it was part of the intention of the shippers of the cargo to land and sell it at Nassau. If it was intended to be stored there, and the voyage of the Bermuda to terminate at that place, except as regards her return to England, no question of contraband can arise in the cause.

7. Spoliation of papers is cause of condemnation, and excludes further proof only as against the party committing it, if interested in the vessel or cargo. Against a party not committing the spoliation, and not authorizing it, nor interested in the act, it neither excludes further proof, nor is it damnatory where other circumstances are clear.

8. There is no proof in the cause that any spoliation of papers was authorized by Mr. Haigh, or conduced to his benefit as owner of the ship; nor is there any evidence of the spoliation of any papers which might properly be considered as proprietary documents.

9. The capture of the Bermuda was unjustifiable; because, first, it was made within the range of modern cannon-shot from British territory; second, it was made within a space embraced by a line drawn due south from the nearest headland on the island of Abaco, above the place of capture; third, because it was made, not on the open sea, but in waters constituting channels between islands belonging to Great Britain, a neutral power; and fourth, because it was made before actual search, and under a general authority to seize certain vessels wherever found.

On each of these points, we conceive that authorities sustain us.*

After argument, on the other side, by *Mr. Speed, A. G.*, and by *Mr. Coffey*, special counsel of the captors, who argued the case thoroughly every way—on the facts, on principles of public law, and on English and American precedents—

The CHIEF JUSTICE delivered the opinion of the court.

These appeals were very fully and ably argued at the last term; and, because of the desire of the court to have all the aid that counsel could give in the examination of the important questions of fact and law presented by the record, were ordered to be reargued at this term. Under this order they have been again thoroughly and exhaustively discussed, and have since received our most deliberate consideration.

The questions arising upon the ownership of the steamship, will first be disposed of.

She was built in 1861, on the eastern coast of England, at Stockton-upon-Tees. On the 1st of August in that year, Edwin Haigh made the declaration of ownership required by the British Merchants' Shipping Act of 1854.† In this

* On the first three points the counsel cited The Ada, Daveis, 407; The Moss, Gilpin, 219; The Steen Bille, cited in Dean on Blockade (Introduction), p. xii; The Jonge Pieter, 4 Robinson, 65; The Stert, Id. 53; The Maria, 5 Id. 325; The Thomyris, Edwards, 17.

On the 5th and 6th points: Hautefeuille, Des Droits et des Devoirs des Nations Neutres, tome iii, pp. 222–3; The Imina, 3 Robinson, 167; The Hendrick and Alida, 1 Hay & Marriot, 96; Wheaton's International Law, 568; The Jacob, 1 Robinson, 90; The Tobias, 1 Id. 329; The Franklin, 3 Id. 217; The Neutralitet, 3 Id. 295.

On the 7th and 8th: The Rising Sun, 2 Robinson, 104; The Hunter, 1 Dodson, 480; The Pizarro, 2 Wheaton, 227.

On the 9th: the question of immunity from capture within actual range of modern cannon-shot—one of the points assumed here—was discussed very interestingly, and with great ingenuity and learning; but it all having been on the assumption of a case not regarded by the court as proved, the authorities are not presented.

† 22 British Statutes at Large, 267, 351, 352.

declaration he described himself as a natural born British subject, asserted himself to be the sole and exclusive owner, and named E. L. Tessier as master. Upon this declaration a certificate of registry was issued the next day, which repeated the statement that Haigh was owner, and Tessier master; and on the following day, the 3d of August, a joint and several power of attorney to sell the ship, at any place out of the kingdom, at any time within twelve months, and for any price thought sufficient by the attorneys, or either of them, was given by Haigh to A. S. Hanckel and G. A. Trenholm, of Charleston, in South Carolina. With these papers the steamship was despatched to Charleston, on her first voyage; but finding, probably, the entrance of that port too dangerous, ran successfully the blockade of Savannah, and returned to England in January, 1862, after an absence of about five months.

The power of sale was sent to Charleston, and remained there. Haigh asserts that this power was intended only for the first voyage; was given because he wished to have the steamer sold in Charleston, or in some other port of the United States, if opportunity should offer, and a sufficient price could be obtained; and was afterwards virtually revoked when he abandoned the idea of sending her again to any southern port.

It is unfortunate for the credit of these statements, that the power was given to enemies of the United States, resident in Charleston, without access to any loyal port except by running the blockade; that it was not limited by its terms to the first voyage, but, on the contrary, was to continue in force twelve months; that it contained no provision insuring a sufficient price, but left that matter, so important to a real owner contemplating a real sale, to the decision of the attorneys, or either of them; and that there is no evidence in the record of any actual revocation of the power, or of any attempt to revoke it, and none, except Haigh's assertion, that the purpose of again sending the ship to a rebel port was ever abandoned.

These first acts bring the ownership into doubt. Haigh

may have been then the true owner; but it is certainly strange that he was in such haste to remove her from his own neutral control, and place her absolutely in the power and at the disposal of the enemies of the United States.

After her return to England a new voyage was planned for the Bermuda, and Fraser, Trenholm & Co., under whose direction, probably, the first voyage was made, now appear conspicuously in her concerns.

Of the members of this firm, Fraser and Trenholm were, doubtless, citizens of South Carolina; so also were, probably, Prioleau and Wellsman, who are mentioned as partners.* The only partner whose declaration that he was a British subject appears in the record was J. R. Armstrong. The Liverpool house thus composed was a branch of the house of John Fraser & Co., of Charleston, and was employed as a depositary and agent of the rebel government at Richmond.†

It was under the direction of this firm that the Bermuda was loaded at Liverpool in February, 1862.

Her former master, Tessier, had been transferred to the Bahama, then at Stockton-on-Tees, but destined to become notorious three months later by her employment, under Tessier, in the conveyance of guns and munitions to the Alabama.‡ In his place, Westendorff had become master of the Bermuda. This person, a citizen of South Carolina, arrived in Liverpool from Charleston in December, in command of the Helen, a ship belonging to John Fraser & Co. Through Fraser, Trenholm & Co., he obtained the official certificate of competency necessary to enable him to take command of the Bermuda, and was appointed master, probably by them, on the 17th January. On the day before this appointment, Fraser, Trenholm & Co. had advised John Fraser & Co. of the despatch of the ship Ella with a cargo to Bermuda Island, to be followed by the steamship Bermuda with goods. The letter containing the advice is not in the record, but the fact appears from a letter of John Fraser & Co. to N. T. Butterfield at Bermuda, relating to these vessels and their cargoes.

* Diplomatic Correspondence, 1863, Part I, App., p. lxxii.

† Ib., 1863, Part I, p. 90.

‡ Ib., 224, 804, and App., lxxv.

The Bermuda, at the date of the Liverpool letter, was lying at a port on the eastern coast, but was at once brought round to Liverpool to receive her cargo.

Her whole lading was under the direction of the Liverpool firm. Haigh was not known in it; while, on the other hand, Fraser, Trenholm & Co. were regarded as owners by many persons on the ship, and by others who certainly were not ill-informed. Thus Tessier, then in command of the Bahama, writing to Westendorff on the 20th February, spoke of Fraser, Trenholm & Co. as "our owners." And so Graham, chief engineer of the Bermuda, deposed on the preparatory examination, "To the best of my knowledge and belief, Fraser, Trenholm & Co. of Liverpool, England, are the owners of the captured vessel." The depositions of Heenan, Noble, and Pierson, firemen on board, were to the same effect.

Against this evidence are the declaration of Haigh, the deposition of Westendorff, and the affidavit of Armstrong, all affirming ownership in Haigh.

Thus stood matters in relation to ownership when the Bermuda left Liverpool on the 1st of March. She was controlled absolutely, in all respects, by Fraser, Trenholm & Co., and they were quite generally regarded as her owners. They, on the other hand, assert that Haigh was the real owner, and that they were acting as his agents; admitting, however, that they had no charter, and no written authority to represent him.

On the day before sailing, Fraser, Trenholm & Co. addressed a letter to the master, Westendorff, directing him to proceed to the island of Bermuda, and deliver his cargo according to the bills of lading. After some general directions as to money for disbursements and other matters, the letter concludes with the information that "the friends" of the firm "in Nassau, New Providence, are H. Adderly & Co.," and with a direction to "call on them, in case of having to take cargo from Bermuda to that port." What other special instructions were given to Westendorff, at Liverpool, the record does not disclose. Every bill of lading required

the cargo mentioned in it to be delivered at Bermuda, to order or assigns. It is clear that the ship was to go to Bermuda, and not beyond, unless something not specified should occur; and the cargo was to be delivered there and not elsewhere, except in the same contingency, to the order of somebody not named.

The ship arrived at the port of St. George's, in Bermuda, on the 19th or 20th March, and remained there five weeks waiting for orders.

And here we may expect to learn who was the unnamed party to whose order the cargo was to be delivered, and what was the contingency in which it was to be taken from Bermuda to another port.

Haigh asserts, and so does Westendorff, that the unnamed consignee was one Butterfield, a resident of Hamilton, one of the ports of Bermuda, and that Butterfield, as consignee of the cargo, being desirous to have it carried on to Nassau, "made an arrangement with the master to that effect." Nothing in the proofs supports, but everything contradicts, this. Butterfield is nowhere named in any paper as consignee; we find no instructions anywhere given to deliver the cargo to him; nor was it by his direction or arrangement that the cargo was sent forward from Bermuda to Nassau.

The real state of facts is disclosed by the letters of Fraser, Trenholm & Co. to John Fraser & Co., and of John Fraser & Co. to N. T. Butterfield, considered in connection with some other matters in the record. On the 23d January, 1862, the branch house at Liverpool wrote to the Charleston house, giving advice of the immediate despatch of the ship Ella to Bermuda with a cargo consigned to John Fraser & Co., or their authorized agent, with authority to dispose of it in any market they should select. This letter suggested that if the Charleston house should not think best to send an agent to Bermuda, any communication for the master of the Ella should be sent, under cover, to Butterfield, and added, that the master was instructed to await orders at Bermuda. On the 28th of February the Liverpool firm directed another letter to John Fraser & Co., or their au-

thorized agent at Bermuda, in which they spoke of the "invoices and bills of lading" of the cargo of the Bermuda as "very full, and as suited to facilitate greatly the delivery and also the transshipment, should this be determined upon." The letter goes on to say that, "should the loss of any of the invoices or bills of lading unfortunately happen, duplicates can be furnished hereafter," but strongly urges, "in case of an opportunity to send them forward with the letters, the adoption of the most certain measures of preventing any of them falling into improper hands."

These letters show what unlimited control John Fraser & Co. were expected to exercise over the ship and cargo of the Bermuda; and that control was exercised.

They had been advised of the coming both of the Ella and Bermuda by the letter of the 16th of January, and on the 1st of April they wrote to their correspondent, Butterfield, saying: "We suppose the steamer Bermuda may be with you ere this, and the ship Ella. We will thank you to request the masters to act as follows, namely: Captain Westendorff to take in the tea and other light articles per Ella, if he has room for them, and proceed to Nassau, reporting himself, on arrival there, to Messrs. Henry Adderly & Co.; Captain Carter to keep in his cargo, and wait further orders from us. They will reach him, we think, very shortly."

This direction was received at Hamilton, where Butterfield resided, on the 19th of April, and was forwarded the same day to Westendorff, at St. George's, and was implicitly obeyed. Captain Westendorff even refused to allow certain printing presses and materials, which formed part of his cargo, to be landed at Bermuda, though requested to do so by George Dunn, the person who seems to have had them in charge, and though the bills of lading expressly required that they should be delivered at Bermuda. He said that the bills were "signed to be delivered to order;" that "the responsibility" of delivery to Dunn would be too great, unless he received instructions to that effect.

No ownership could give more absolute control than was exercised over the ship and whole cargo by John Fraser &

Co. That control and the action of the master leave no doubt that they were the unnamed party to whom the cargo was to be delivered, and whose orders the Bermuda was to await; nor can there be any doubt that Westendorff had instructions to obey, absolutely and in all things, their directions, both as to ship and cargo.

Whether the cargo was to be transshipped, or to be carried on to Charleston without transshipment, was probably left to be determined by circumstances after arrival at Nassau.

It appears from letters and papers in the record that a light draft steamship, named the Herald, was connected with the Bermuda as a tender; and it seems that it was to transshipment into that steamship that Fraser, Trenholm & Co. referred in their letter of January 28.

There is not much about the Herald in the record; but what we find is instructive. A letter, dated Liverpool, February 16, 1862, without signature, but addressed to one of the engineers of the Bahama, and written, probably, by one of the engineers of the Bermuda, says: "Our tender left yesterday; don't be at all surprised that we have got a tender. They bought a light draft boat at Dublin, used to run the mail once, called the Herald." The writer proceeds to describe this tender as "two hundred and eighty feet in length," drawing "ten feet heavy, and five and a half feet light;" with "her boilers stayed and strengthened;" with "an average speed of eighteen and a half knots;" with "all her lower cabins razeed to make cargo space;" with "a crew shipped for twelve months, for some port or ports south of Mason's and Dixon's line;" with "three captains on board: one an Englishman, nominal; another, an experienced coast pilot from the Potomac to Charleston; and another, the same from Charleston to San Juan." This correspondent expresses the opinion, that "if the Yankees catch her, they are smarter than he gives them credit for;" and adds, "she waits our arrival at Bermuda," "but goes into Charleston first, to see about the stone fleet." The letter of Tessier to Westendorff, written four days later and already cited, speaks of the Herald as on her voyage across

the Atlantic, under the command of Captain Mitchell. There is a statement, too, in the deposition of Farrally, one of the firemen of the Bermuda, that the Herald was at Bermuda with several captains, while the steamship was there, and was understood to be intended to run the blockade; and that it was "the talk that the Herald was connected with our ship." It appears, also, from a bill of exchange drawn by Mitchell, master of the Herald, on Fraser, Trenholm & Co., that Westendorff supplied funds for that steamer at Bermuda.

This bill must have been drawn under instructions, and the fact strongly confirms what other parts of the record disclose of the connection between the two vessels.

The attendance of the Herald was, doubtless, to facilitate transshipment, should transshipment be directed by John Fraser & Co., and to secure the conveyance of the cargo to its ultimate destination.

Why no transshipment took place at Bermuda; whether transshipment was intended at Nassau; whether the Herald visited Charleston during the detention of Westendorff's ship at St. George's; whether it was finally concluded that the Bermuda herself should attempt to run the blockade, are matters thus far left in doubt.

The Bermuda sailed from St. George's on the 23d of April, and was captured on the 27th.

At the time of capture, two small boxes and a package, supposed to contain postage-stamps, were thrown overboard, and a bag, understood to contain letters, was burned. The bag was burned by the captain's brother, and under the orders of the captain, after the vessel had been boarded by the captors. It was burnt, as Westendorff says, in pursuance of his instructions. One of the passengers, also, burned a number of letters, which, he says, were private.

The instructions, in pursuance of which this destruction of papers was made, are not produced; nor is any explanation of this spoliation offered. The instructions were, doubtless, given by John Fraser & Co., in view of the contingency of capture, and were in accordance with the suggestion of

Fraser, Trenholm & Co.'s letter of the 28th of February, that the most certain measures should be adopted to prevent any of the bills of lading or invoices falling into improper hands. They, doubtless, included directions for the destruction of all compromising papers, and among them of the instructions themselves. If they had been preserved and produced, it is not unlikely that they would have disclosed the real ownership of the vessel, the true nature of her employment, and the actual destination of both ship and cargo.

This spoliation was one of unusual aggravation, and warrants the most unfavorable inferences as to ownership, employment, and destination.

All these transactions, prior to capture, and at the time of capture, repel the conclusion that Haigh was owner. Not a document taken on the ship shows ownership in him except the shipping articles, and these were false in putting upon the crew list employees of the rebel government and enemy passengers—the last under assumed names. He was permitted to put into the cause his original declaration of ownership of August 1, 1861, by way of further proof; but we cannot give much weight to this, in view of the "Certificate of Transactions subsequent to Registry," which shows his execution of the power of sale to Hanckel & Trenholm. After giving that power, there is no indication that he performed a single act of ownership. No letter alluded to him as owner. No direction relative to vessel or cargo recognized him as owner. All the papers and all the circumstances indicate rather that a sale was made in Charleston under the power, by which the beneficial control and real ownership were transferred to John Fraser & Co., while the apparent title, by the British papers, was suffered to remain in Haigh as a cover.

The spoliation makes the conclusion of ownership out of Haigh and in John Fraser & Co. wellnigh irresistible. Would the master have obeyed such instructions from John Fraser & Co., if he had been really appointed by Haigh, and was really responsible to him as owner? We are obliged to

think that the ownership of Haigh was a pretence, and that the vessel was rightly condemned as enemy property.

We will next consider the questions relating both to vessel and cargo, which join arising from employment in the trade and under the direction and control shown by the record, assuming for the moment that Haigh was owner.

How, then, was the Bermuda employed? In what trade, and under what control and direction?

The theory of the counsel for Haigh is that she was a neutral ship, carrying a neutral cargo, in good faith, from one neutral port to another neutral port; and they insist that the description of cargo, if neutral, and in a neutral ship, and on a neutral voyage, cannot be inquired into in the courts of a belligerent.

We agree to this. Neutral trade is entitled to protection in all courts. Neutrals, in their own country, may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, nor suffer to be prepared within their territory, armed ships or military or naval expeditions against either. So, too, except goods contraband of war, or conveyed with intent to violate a blockade, neutrals may transport to belligerents whatever belligerents may agree to take. And so, again, neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port.

It is asserted by counsel that a British merchant, as a neutral, had, during the late civil war, a perfect right to trade, even in military stores, between their own ports, and to sell at one of them goods of all sorts, even to an enemy of the United States, with knowledge of his intent to employ them in rebel war against the American government.

If by trade between neutral ports is meant real trade, in

the course of which goods conveyed from one port to another become incorporated into the mass of goods for sale in the port of destination; and if by sale to the enemies of the United States is meant sale to either belligerent, without partiality to either, we accept the proposition of counsel as correct.

But if it is intended to affirm that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it.

Very eminent writers on international maritime law have denied the right of neutrals to sell to belligerents, even within neutral territory, articles made for use in war, or to transport such articles to belligerent ports without liability to seizure and confiscation of goods and ship. And this is not an illogical inference from the general maxim that neutrals must not mix in the war. International law, however, in its practical administration, leans to the side of commercial freedom, and allows both free sale and free conveyance by neutrals to belligerents, if no blockade be violated, of all sorts of goods except contraband; and the conveyance, even of contraband goods, will not, in general, subject the ship, but only the goods, to forfeiture.

We are to inquire, then, whether the Bermuda is entitled to the protection of this rule, or falls within some exception to it.

It is not denied that a large part of her cargo was contraband in the narrowest sense of that word. One portion was made up of Blakely cannon and other guns in cases, of howitzers, of cannon not in cases, of carriages for guns, of shells, fuses, and other like articles—near eighty tons in all; and of seven cases of pistols, twenty-one cases of swords, seventy barrels of cartridges, three hundred whole barrels, seventy-eight half-barrels, and two hundred and eighty-three quarter-barrels of gunpowder. Another portion consisted of printing-presses and materials, paper, and Confederate States

postage stamps, and is described in a letter, found on board, as "presses and paraphernalia complete," "obtained from Scotland by a commissioner of the Confederate government,' and sent with a "lot of printers and engravers." The names of these printers and engravers, or at least the names by which they were known on board, are in the crew list; but Westendorff, in a letter already referred to, calls them his "government passengers;" and all the facts connected with this part of the cargo indicate that it actually belonged to the rebel government and was intended for its immediate use. Other very considerable portions of the cargo were also contraband within the received definitions of the term.

The character of this cargo makes its ulterior, if not direct, destination to a rebel port quite certain. And there is other evidence. The letters of Fraser, Trenholm & Co. make distinct references to the contingency of transshipment; and the evidence shows that the Herald was sent over with a view to this. The consignment of the whole cargo was to order or assigns—that is to say, as we have seen, to the order of John Fraser & Co. or assigns, and is conclusive, in the absence of proof to the contrary, that its destination was the port in which the consignee resided and transacted business.* There is much other evidence leading to the same conclusion; but it is needless to go further.

It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo.

The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade-runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene.

* Grove v. O'Brien, 8 Howard, 432; Lawrence v. Minturn, 17 Id. 106.

This was distinctly declared by this court in 1855,* in reference to American shipments to Mexican ports during the war of this country with Mexico, as follows: "Attempts have been made to evade the rule of public law by the interposition of a neutral port between the shipment from the belligerent port and the ultimate destination in the enemy's country; but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation."

The same principle is equally applicable to the conveyance of contraband to belligerents; and the vessel which, with the consent of the owner, is so employed in the first stage of a continuous transportation, is equally liable to capture and confiscation with the vessel which is employed in the last, if the employment is such as to make either so liable.

This rule of continuity is well established in respect to cargo.

At first, Sir William Scott held that the landing and warehousing of the goods and the payment of the duties on importation was a sufficient test of the termination of the original voyage; and that a subsequent exportation of them to a belligerent port was lawful.† But in a later case, in an elaborate judgment, Sir William Grant‡ reviewed all the cases, and established the rule, which has never been shaken, that even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to bring them into the common stock of the country. If there be an intention, either formed at the time of original shipment, or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port.

There seems to be no reason why this reasonable and settled doctrine should not be applied to each ship where several

* Jecker v. Montgomery, 18 Howard, 114.

† The Polly, 2 Robinson, 369.

‡ The William, 5 Id. 395; 1 Kent's Commentaries, 84, note

are engaged successively in one transaction, namely, the conveyance of a contraband cargo to a belligerent. The question of liability must depend on the good or bad faith of the owners of the ships. If a part of the voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, the ship cannot be liable; but if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage, must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole. The ships are planks of the same bridge, all of the same kind, and all necessary to the convenient passage of persons and property from one end to the other.

There remains the question whether the Bermuda, on the supposition that she was really a neutral ship, should be condemned for the conveyance of contraband. For, in general, as we have seen, a neutral may convey contraband to a belligerent, subject to no liability except seizure in order to confiscation of the offending goods. The ship is not forfeited, nor are non-offending parts of the cargo.

This has been called an indulgent rule, and so it is.* It is a great, but very proper relaxation of the ancient rule, which condemned the vessel carrying contraband as well as the cargo. But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumption is not repelled by proof.

* The Ringende Jacob, 1 Robinson, 90; The Sarah Christina, Id. 288. See opinions of Bynkershoeck and Heineccius, cited in notes to The Mercurius, Id. 288, and The Franklin, 3 Id. 222.

The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting.

The Franklin, therefore, carrying contraband with a false destination, was condemned, after mature consideration, by Sir William Scott in 1801.* He said that, "the benefit of the relaxation could only be claimed by fair cases." This doctrine was shortly after applied to *The Neutralitet* by the same great judge;† and it received the sanction of this court in an opinion delivered by an equal judge, in 1884.‡ The leading principle governing this class of cases was stated very clearly by Mr. Justice Story in that opinion, thus: "The belligerent has a right to require a frank and *bonâ fide* conduct on the part of neutrals in the course of their commerce in times of war, and if the latter will make use of fraud and false papers to elude the just rights of belligerents and cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation."

Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and the general features of the transaction, must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war.

The Ranger, though a neutral vessel, was condemned for being employed in carrying a cargo of sea stores to a place of naval equipment under false papers. The owner had not consented, but the master had, and Sir William Scott said, "If the owner will place his property under the absolute management and control of persons who are capable of lending it in this manner to be made an instrument of fraud in the hands of the enemy, he must sustain the consequences of such misconduct on the part of his agent."§

* The Franklin, 3 Robinson, 224. † The Neutralitet, Id. 296.

‡ Carrington v. Merchants' Insurance Co., 8 Peters, 518, opinion by Story, J. § The Ranger, 6 Robinson, 126.

So, too, *The Jonge Emilia*, a neutral vessel, was condemned on the ground that she appeared to have been altogether in the hands of enemy merchants and employed for seven voyages successively in enemy trade;* and *The Carolina*† was condemned for employment in the transportation of troops, though the master alleged that it was under duress, and the actual service was at an end.

Now, what were the marks by which the conveyance of contraband on the Bermuda was accompanied? First, we have the character of the contraband articles, fitted for immediate military use in battle, or for the immediate civil service of the rebel government; then the deceptive bills of lading requiring delivery at Bermuda, when there was either no intention to deliver at Bermuda at all, or none not subject to be changed by enemies of the United States; then the appointment of one of these enemies as master, necessarily made with the knowlege and consent of Haigh, if he was owner; then the complete surrender of the vessel to the use and control of such enemies, without even the pretence of want of knowledge, by the alleged owner, of her destined and actual employment.

We need not go further. We are bound to say, considering the known relations of Fraser, Trenholm & Co. with the rebel leaders; and the relations of John Fraser & Co. to the same combination, justly inferable from the fact that they were the consignees of the whole cargo; and considering, also, the ascertained character of most of it, that it seems to us highly probable that the ship, at the time of capture, was actually in the service of the so-called Confederate government, and known to be so by all parties interested in her ownership.

However this may be, we cannot doubt that the Bermuda was justly liable to condemnation for the conveyance of contraband goods destined to a belligerent port, under circumstances of fraud and bad faith, which make the owner, if

* The Jonge Emilia, 8 Robinson, 52. † The Carolina, 4 Id. 256.

Haigh was owner, responsible for unneutral participation in the war.

The cargo, having all been consigned to enemies, and most of it contraband, must share the fate of the ship.

Having thus disposed of the questions connected with the ownership, control, and employment of the Bermuda, and the character of her cargo, we need say little on the subject of liability for the violation of the blockade. What has been already adduced of the evidence, satisfies us completely that the original destination of the Bermuda was to a blockaded port; or, if otherwise, to an intermediate port, with intent to send forward the cargo by transshipment into a vessel provided for the completion of the voyage. It may be that the instructions to Westendorff were not settled when the steamship left St. George's for Nassau; but it is quite clear to us that the ship was then at the disposition of John Fraser & Co., and that the voyage, begun at Liverpool with intent to violate the blockade, delayed at St. George's for instructions from that firm, continued toward Nassau with the purpose of completion from that port to a rebel port, either by the Bermuda herself or by transshipment, was one voyage from Liverpool to a blockaded port; and that the liability to condemnation for attempted breach of blockade was, by sailing with such purpose, fastened on the ship as firmly as it would have been by proof of intent that the cargo should be transported by the Bermuda herself to a blockaded port, or as near as possible, without encountering the blockading squadron, and then sent in by a steamer, like the Herald, of lighter draft or greater speed.

We have not thought it necessary to examine the questions made by counsel touching the right of belligerents to make captures within cannon-shot range of neutral territory, for there is nothing in the evidence which proves to our satisfaction that the Bermuda was within such range.

Our conclusion is, that both vessel and cargo, even if both were neutral, were rightly condemned; and, on every ground, the decree below must be

AFFIRMED.

Statement of the case.

[After the preceding confirmation of the decree of the District Court of Philadelphia—which, it will have been noted by the reader, was one condemning only the vessel (claimed by Haigh), and the munitions of war, &c. (claimed by Captain Blakely)—judgment as to the residue of the cargo having been reserved,—a decree was passed by the District Court, condemning this whole residue also.—See 28 Legal Intelligencer, 116.]

NOTE.

Along with the preceding case was submitted another, much like it, the case of—

THE HART.

Neutrals who place their vessels under belligerent control, and engage them in belligerent trade; or permit them to be sent with contraband cargoes, under cover of false destination, to neutral ports, while the real destination is to belligerent ports; impress upon them the character of the belligerent in whose service they are employed, and the vessels may be seized and condemned as enemy property.

THE present case came here by appeal from a decree of the District Court of the United States for the Southern District of New York; a decree condemning the schooner Hart and her cargo as lawful prize of war. The vessel was claimed below by one Harris; the cargo by Samuel Isaacs.

The whole cargo consisted of arms and munitions of war, taken on board, principally, at London, under the direction of agents of the rebel government, with consent, by the owner or owners of the schooner, to the intended fraud on belligerent rights. The nominal destination of the vessel and cargo was Cardenas; but the preparatory proofs clearly established that this pretended destination was false, and that the entire lading was to be there transshipped, to be conveyed by a swifter vessel, or was to be carried on without transshipment to its belligerent destination, at the discretion of the rebel agent, whose instructions the master was directed to receive and obey on arrival at Cardenas.

Mr. Coffey, for the captors; no one appearing, nor any argument being submitted for the claimants.

Statement of the case.

The CHIEF JUSTICE: The case in its principal features resembles that of the Bermuda and her cargo; they are, perhaps, even more irreconcilable with neutral good faith.

It is enough to say that neutrals who place their vessels under belligerent control, and engage them in belligerent trade, or permit them to be sent with contraband cargoes under cover of false destination to neutral ports, while the real destination is to belligerent ports, impress upon them the character of the belligerent in whose service they are employed, and cannot complain if they are seized and condemned as enemy property.

The principles recognized in the preceding case require the affirmance of the decree of the District Court; and it is

AFFIRMED ACCORDINGLY.

BOLLINGER'S CHAMPAGNE.

1. Under the Tariff Act of June 30, 1864, which lays a specific duty per gallon upon wines, and an *ad valorem* duty also, with a proviso that no *champagne* in bottles shall pay a *less* rate than $6 per dozen (quart) or two dozen (pint) bottles, the effect is that if the specific duty upon the gallon and the *ad valorem* duty *exceed* the sum of six dollars per dozen (quart) or two dozen (pint), the rate thus estimated will be the duty imposed. It is only when the rate falls *under* the sum of $6 that no less sum is chargeable.
2. Any entry of champagne wines knowingly made by means of false invoices, false certificates to the consul, or by means of any other false or fraudulent documents or papers, forfeits it, irrespective of the fact that if the entry had been truly made, the duty would have been no greater. The penalty is attached to the act of false entry, not to the result which such entry may, in the specific instance, produce on the revenue.

THE Revenue Act of March 3, 1863,* provides that every invoice of goods imported from a foreign country (when obtained otherwise than by purchase and subject to *ad valorem* duty) shall have indorsed upon it a declaration signed by the owner, agent, &c., setting forth that it contains "a *true*

* 12 Stat. at Large, 737.

and *full* statement of the actual market value thereof at the time when and the place where they were procured or manufactured;" and further, that if any such owner, agent, consignee, &c., of any goods, shall knowingly make, or attempt to make an entry thereof by means "of any invoice which shall not contain a *true* statement of all the particulars herein before required, or, by means of any other false or fraudulent document, or paper, or any other *false* or fraudulent practice, or appliance whatsoever, said goods, &c., *shall be forfeited*," &c.

The Tariff Act of June 30, 1864,* lays the following duties:

"On wines of all kinds, valued at not over fifty cents per gallon, twenty cents per gallon and twenty-five per centum *ad valorem;* valued at over fifty cents, and not over one dollar per gallon, fifty cents per gallon, and twenty-five per centum *ad valorem;* valued *at over one dollar per gallon, one dollar per gallon, and twenty-five per centum ad valorem; provided*, that *no champagne*, or sparkling wines, in bottles, shall pay a *less* rate of duty than *six dollars per dozen bottles, each bottle containing not more than one quart*, and more than one pint, or six dollars per two dozen bottles, each bottle containing not more than one pint."

With these statutes in force, a libel for *undervaluation* was filed in the District Court for the Northern District of California against a quantity of champagne imported from France to the port of San Francisco, and entered at the customs there in November, 1864. On the trial evidence was given tending to prove that the wines in question were knowingly invoiced by their manufacturers at prices below the actual market value at the time when and place where they were manufactured; that he knowingly entered them at the customs on an invoice that did not state such actual market value; and that such actual market value was *forty-eight francs per case of twelve (quart) bottles.*

The court charged that under the act of June 30th, 1864, the undervaluation did not affect the amount or rate of

* 13 Stat. at Large, 202.

duties chargeable on the wines; that, if they had been invoiced and entered at their true and actual market value, they would still have been subject to a specific duty of but six dollars per dozen (quart) bottles, and, therefore, that the wines were not forfeited by reason of their having been knowingly entered on a false invoice.

The idea of the learned district judge, so far as the reporter could understand a case which came up on a very meagre record and was not argued here at all on one side, and by short brief only on the other, was this. The true, actual market value of the wine at the place of production was forty-eight francs or (estimating the franc at its custom-house valuation of 18 cents 6 mills) $8.92 for twelve quarts in bottles.* This would make the wine worth $2.97 per gallon; on which the *ad valorem* duty (25 p. c. per gallon), would be:

For three gallons, or the whole twelve bottles, ...	75
Adding the specific duty ($1 per gallon), ...	8 00
Gave the entire duty, *independently of the proviso*, . .	$3 75

But the importer had paid at any rate $6; and paid, therefore, just as much as he would have paid had he given in the true, actual market value of 48 francs per dozen quart bottles.

The claimant having had judgment, and this being approved by the Circuit Court, the case was now here on writ of error for review.

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* I presume that in a question of customs duty the custom-house valuation of the franc was taken. It is a curious fact, however, shown by a note addressed to me in reply to an inquiry from me as to the matter, by the Hon. James Ross Snowden, ex-director of the Federal mint and well known to the country as one of its most learned numismatologists, that in the United States the franc has no less than three different values:

	c.	m.
1. Custom-house valuation, ...	18	6
2. Silver franc, mint price, ...	19	6
3. Gold franc, full weight, ...	19	27

The matter is perhaps of a sufficient interest, extraneous to the case, to induce my preservation of his note to me in an appendix. (See Appendix No. II.)—REP.

Messrs. Speed, A. G., and Lake, D. A. for California, by brief, for the United States; no counsel appearing for the claimant.

Mr. Justice NELSON delivered the opinion of the court.

It will be perceived that the duty imposed by the Tariff Act of June 30th, 1864, is both specific and *ad valorem;* and, according to the proviso, as it respects champagne or sparkling wines, in bottles, of a given quantity in each, not less than six dollars per dozen, or six dollars per two dozen, as may be the quantity, shall be imposed as the duty. The effect of the proviso is, that, if the specific duty upon the gallon, and the *ad valorem* duty on the appraised value, in the aggregate, as it respects the article of champagne or sparkling wines, as the case may be, in bottles, exceed the sum of six dollars per dozen, or two dozen, the rate thus estimated will be the duty imposed; but if the rate falls under the sum of six dollars, then, by virtue of the proviso, not less than that sum shall be exacted.

It will be observed that, in order to carry into effect this act, an appraisal at the customs, in the case of the specific duty on the gallon, is as essential as the appraisal in the case of an *ad valorem* duty. For the specific duty is apportioned according to the value of the article; wines valued at not over fifty cents per gallon, pay twenty cents per gallon; valued at over fifty and not over one dollar per gallon, fifty cents specific duty, and so on.

Now, the District Court charged in effect that, as the specific and *ad valorem* duty, in the aggregate, if properly appraised and estimated as appraised on the trial, was under six dollars per dozen, no higher duties would have been charged by the government than that sum; the sum which was paid on the entry to the collector.

The principle involved in the ruling is, that no matter how much fraud and imposition may have been practised upon the officers of the customs, or, however false may have been the invoice, or other papers of the shipment, and oath of the importer or agent upon which the entry of the goods is made, if it turns out in the result, that the value of duty required by law has been paid, no penalty attaches.

We cannot agree to this construction of the act of 1863, which prescribes this penalty, nor of the act of 1864 imposing the duty. The penalty of forfeiture is annexed to the act of making an entry knowingly by means of false invoices, or false certificate of the consul, or of any other invoice which contains an undervaluation, or by means of any other false or fraudulent documents or papers. No doubt one of the objects of the provision is to secure to the government the duties imposed by the statute, but another is, to protect the officers against imposition and fraud by the importer or agent, and to inculcate and enforce good faith and honest dealing with those officers while engaged in the execution of their duties.

Besides, under this provision of the act of 1864, the result which is assumed in the instruction to the jury, as the only material fact in disposing of the case, is one to be ascertained by the officers of the customs, and this, after the entry of the goods upon the invoice duly verified, and an appraisal and estimate of the amount of the duties. This is the way prescribed by the law to determine whether or not the duties in the aggregate fall under the rate of six dollars per dozen bottles. The reason, therefore, for integrity in all the documents and papers of the shipment, and fair dealing on the part of the importers or their agent, is as applicable to the present case as to any other importation and entry.

We think that the court below erred, and that the judgment should be

REVERSED.

THE DOURO.

The court reproves counsel who take appeals without any expectation of reversal, and declares that if it had power to impose a penalty in such cases, as it has when writs of error are sued out for delay merely, it would impose it.

APPEAL from a decree of the District Court of the United States for the Southern District of New York, condemning

the Douro and her cargo for a breach of the blockade of the port of Wilmington, North Carolina, established by our government during the late rebellion.

The vessel had been captured as prize of war by one of the government steamers, about two hundred miles off the port just named, and being brought into the port of New York was there libelled in prize.

C. Edwards, Esq., as attorney, filed a claim for certain British subjects, owners of the vessel and cargo. These admitted in substance that the vessel had come out of the port of Wilmington on the voyage in which she was captured, but alleged that there was no efficient blockade of that port, and seemed to rest their defence on the ground, that having eluded the vigilance of the blockading vessels on duty off that port, and reached the open sea, she was not subject to capture by any other vessel of the United States. The test-oaths were made by Mr. Edwards only.

The master of the captured vessel, on his examination preparatory to the original hearing, said: "I knew the port of Wilmington was blockaded when I went in, for I had six guns fired at me; and I knew it when I came out." And again: "The vessel was captured because she had been running the blockade." And again: "The capturing vessel fired a broadside, or half a broadside at us, amounting to some fifty-five guns. This was done because we were trying to escape." The mate said the same thing.

The District Court condemned both vessel and cargo as lawful prize of war; from which decree the claimants, by counsel—whose name the reporter supposes that, after the opinion of the court has been read, he will be excused by the benevolent reader for not signalizing—appealed to this court.

Mr. Coffey, special counsel for the captors, remarking that it was difficult to see why the court was troubled with this appeal, declined to argue the case, as being too plain to occupy the time of the court with; and submitted it with the record and a short brief. No counsel for the claimant appeared before this tribunal.

Syllabus.

The CHIEF JUSTICE delivered the opinion of the court.

The decree of the District Court in this cause is affirmed. It is impossible to imagine a plainer case for condemnation for breach of blockade. The statements of the captain as to breaking the blockade are explicit, and the mate says substantially the same thing as he does.

We cannot approve the conduct of the counsel who advised this appeal. An appeal is a matter of right, and, if prayed, must be allowed; but should never be prayed without some expectation of reversal. We impose penalties when writs of error merely for delay are sued out, in cases of judgments at law for damages; and if the rule were applicable to the case before us we should apply it.

THE MOHAWK.

1. The act of December 28, 1852, authorizing foreign vessels wrecked and repaired in the United States, to be registered or enrolled, is to be taken as a part of our system of registration and enrolment.
2. Vessels engaged in the foreign trade are *registered*, and those engaged in the coasting and home trade are *enrolled;* and the words "register" and "enrolment" are used to distinguish the certificates granted to those two classes of vessels.
3. The two statutes providing generally for registry and enrolment of vessels, are the act of December 31, 1792, applicable exclusively to registry of vessels engaged in foreign commerce, and the act of July 18, 1793, applicable exclusively to vessels engaged in domestic commerce.
4. The penalty of forfeiture of a vessel for the use of a certificate of registry to which she is not entitled, found in the 27th section of the act of 1792, is not imported into the act of 1793; and there is no forfeiture under that act for the use of a fraudulent enrolment.
5. But the act of March 2d, 1831, concerning vessels used on our northern frontiers, which are necessarily engaged in both the foreign and home traffic at the same time, makes the certificate of enrolment equivalent to both registry and enrolment.
6. This act does, by the *proviso* to its 3d section, apply the penalty of forfeiture contained in the 27th section of the act of 1792 to an enrolment having the effect of a register fraudulently obtained.

Statement of the case.

AN act of Congress of 1792* (section 27th), provides that "if any certificate of registry *or record* shall be fraudulently or knowingly used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States."

An act of 1793† concerning the enrolment of vessels engaged in domestic commerce, enacts (section 2d) that "in order for the enrolment of any vessel, she shall possess the same qualifications, and the same requisites, in all respects, shall be complied with, as are necessary for registering ships by the registry law; and the same duties are imposed on all officers with the same authority in relation to enrolments, and the same proceedings shall be had touching enrolments."

An act of December 23, 1852,‡ authorizes the Secretary of the Treasury to issue a register or enrolment for any vessel built in a foreign country, whenever such vessel may have been, or shall hereafter be wrecked in the United States, and shall have been, or may hereafter be purchased and repaired by a citizen or citizens thereof; *provided*, that it shall be proved to the satisfaction of the Secretary of the Treasury, that the repairs put upon such vessel shall be equal to three-fourths of the cost of said vessel, when so repaired.

Intermediate in date between the act last mentioned and the one of 1793 just before it set forth, there is another act. This act, dated March 2, 1831,§ provides by its third section that any vessel of the United States navigating the waters of our northern, northeastern, and northwestern frontiers, otherwise than by sea, shall be enrolled and licensed in such form as may be prescribed by the Secretary of the Treasury, "which enrolment and license shall authorize any such vessel to be employed either in the coasting or foreign trade; and no certificate of registry shall be required for any vessel

* December 31, 1792; 1 Stat. at Large, 287.
† February 18, 1793; Id. 305. ‡ 10 Id. 149.
§ 4 Id. 457.

so employed on said frontiers; *provided, that such vessel shall be in every other respect liable to the rules, regulations, and penalties now in force relating to registered vessels on our northern, northeastern, and northwestern frontiers.*"

With these four different statutes in force, Sloan and others, wishing to give to a Canadian-built and owned vessel, the advantages of one with American papers, scuttled her and pretended that she had been accidentally made a wreck. They then raised her and put her in order; and falsely swearing, for the purpose of changing her to an American vessel, that the repairs were "equal to three-fourths of her cost when so repaired," procured American papers for her from the Secretary of the Treasury under the act of December 23, 1852.

The United States now libelled her in the District Court of Michigan, with the idea—

1. That under the three acts, first above mentioned, to wit, the acts of 1792, 1793, and 1852 alone, she was liable to forfeiture.

2. That if this was not so, she was certainly liable under these acts in connection with the act of March 2, 1831.

The District Court thought that the acts were not so essentially parts of one system as that the earlier ones could be imported into the latter, and dismissed the libel; and of this view was the Circuit Court. On appeal by the United States, the matter was now here for review.

Mr. W. A. Moore, in favor of the decrees below: The idea of the United States in libelling this vessel has been, that the act of 1852 is to be read as if it was a part of the original act of 1792; and that by this process the vessel will become subject to the 27th section of the latter act. The government assumes the acts to be acts in *pari materiâ;* and accordingly concludes that they are to be read as one act. But this is a misapplication of a sound maxim. The rule of *pari materiâ* is one of construction simply. Acts on the same subject are to be read together, that you may get such light as all the parts throw on each part, and thereby more accu-

rately interpret any doubtful provisions. The language of Lord Mansfield is: "They shall be taken and construed together as one system, and explanatory of each other."* For no other purpose are different acts to be taken as one law. There is no case which authorizes a court to import independent and distinct provisions from one act into another; to tack the independent provisions of one act to another. There could not be; for, under the rule of *pari materiâ*, laws which have expired, or which have been repealed, may be considered. Now, it would be absurd to say that the repealed or expired acts were to be taken as a part of the law itself. Yet such would be the logical effect, if we accepted the meaning which government gives the rule.

An act may, indeed, be amended; and this by substitution, addition, diminution, or other qualification. The legal effect is, of course, to substitute the amended form for the original form, and to render it subject to the same relation to all other parts of the act. In this case, the amendments become a part of the amended law, in the most literal sense. It becomes such by incorporation. But this is not the sense which the rule *pari materiâ* contemplates, when it says that different acts are to be taken together as one law.

The government has probably proceeded, we suppose, on a misapplication of the rule which the cases lay down for construing revenue statutes. The court, under the rule referred to, reads the whole revenue code together, in order to interpret its different parts; to see how far a subsequent act has repealed or modified a former act; to see what provisions of the former acts, relating to the same particulars, are still in force, &c., &c. Thus, in *Stuart* v. *Maxwell*,† the question was, whether the Tariff Act of 1846 repealed certain provisions of the Tariff Act of 1842; and in order to reach a sound interpretation, the court read both acts together. So in *Ring* v. *Maxwell*,‡ the question was, whether a provision of the Tariff Act of 1842 had been repealed by a subsequent act. These were both correct applications of

* Rex v. Loxdale, 1 Burrow, 447. † 16 Howard. 158

‡ 17 Id. 14"

the rule. The critical observations of Curtis, J., in the last case,* confirms both of our positions.

Applying this rule to the case, we are unable to see that the decree should be reversed. We think it plain that the penalty of forfeiture found in the 27th section of the act of 1792 is not imported into the act of 1793; and that it would be straining to hold even that the *proviso* to the 3d section of the act of March 2, 1831, applied the penalty contained in the section above named of the act of 1792, to any enrolment.

Mr. Speed, A. G., and Mr. Assistant Attorney-General Ashton, contra.

Mr. Justice MILLER delivered the opinion of the court.

The act of December 23, 1852, authorized the Secretary of the Treasury to issue a register or enrolment for any vessel built in a foreign country, whenever such vessel may have been, or shall hereafter be, wrecked in the United States, and shall have been, or may hereafter be purchased and repaired by a citizen or citizens thereof: *provided*, that it shall be proved to the satisfaction of the Secretary of the Treasury, that the repairs put upon such vessel shall be equal to three-fourths of the cost of said vessel, when so repaired.

In this act, under which the owners of the Mohawk procured the enrolment, and the whole of which we have just quoted, there is nothing which inflicts such forfeiture, or any other penalty for fraud or false swearing, in procuring the action of the secretary.

This act is, however, to be construed as a part of our system of registry and enrolment of vessels, and as merely adding another class which may be registered and enrolled to those enumerated in the previous statutes. Whatever, therefore, may be found in those statutes imposing a penalty for fraud in procuring the enrolment of a vessel, may well be held to apply to an *enrolment* under the act of 1852.

We emphasize the word *enrolment*, because the registry

* Pages 150–1.

of a vessel and the enrolment of a vessel are essentially different things, are provided for by different statutes, and are applicable to vessels engaged in different and distinct pursuits. Hence the act of 1852 says that the secretary may issue to a vessel, such as it describes, "a register or enrolment."

The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license.*

The distinction between these two classes of vessels is kept up throughout the legislation of Congress on the subject, and the word register is invariably used in reference to the one class, and enrolment in reference to the other.

There are two statutes in force making general provisions for the subjects of registry and enrolment of vessels. One of them is the act of December 31, 1792, which applies exclusively to vessels engaged in foreign commerce and to their registry, and the other is the act of February 18, 1793, which relates to vessels engaged in the coasting trade and fisheries, and to their enrolment.

The act of 1792 provides, that "if any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States." This section does not refer to an enrolment, because neither the word registry or record is usually applied to an enrolment, and because the true intent of the act can have reference to no other class of vessels than those engaged in foreign commerce, which are required to take out a register.

The act of 1793, concerning the enrolment of vessels engaged in domestic commerce, enacts, by the second section, that "in order for the enrolment of any vessel, she shall

* Gibbons v. Ogden, 9 Wheaton, 214.

possess the same qualifications, and the same requisites, in all respects, shall be complied with, as are necessary for registering ships by the registry law; and the same duties are imposed on all officers with the same authority in relation to enrolments, and the same proceedings shall be had touching enrolments." From this it is argued, that forfeiture shall take place under like circumstances as is provided for in the registry law. But there is not only nothing in the terms used which refers to penalties, but there is nothing which can be held to have such reference by any fair implication. These provisions concern the class or qualifications of vessels which may be enrolled, the requisites to be complied with before enrolment, the duties and authority of officers connected with the enrolment, and the proceedings to be had in obtaining enrolment. In all these particulars the rules of the registry law are adopted. The act makes sufficient provision for false affidavits, and has its penalties for them, but forfeiture of the vessel is not one of them.

But the act of March 2, 1831, undertakes, as its title imports, to regulate both the foreign and coasting trade, on the *northern*, *northeastern*, and *northwestern* frontiers of the United States.

In these regions the domestic and the foreign trade are so blended that the same vessel is almost necessarily engaged in both at the same time, and often during the same voyage. To meet this kind of trade the third section of that act says, in reference to vessels engaged in navigating those waters, that "they shall be enrolled and licensed in such form as may be prescribed by the Secretary of the Treasury; which enrolment and license shall authorize any such boat, sloop, or other vessel, to be employed either in the coasting or foreign trade, and no certificate of registry shall be required for vessels employed on said frontiers; *provided*, that such boat, sloop or other vessel, shall be in every other respect liable to the rules, regulations, and penalties now in force relating to registered vessels, on our northern, northeastern, and northwestern frontiers."

Statement of the case.

It is the obvious policy of this act to enable a class of vessels which are engaged in both the foreign and the coasting trade at the same time, to do so without the necessity of taking out both a register and an enrolment. For this purpose the act makes the enrolment equivalent to both register and enrolment. In giving to the enrolment the effect of a register, it very properly subjects the vessel to all the rules, regulations, and penalties relating to registered vessels. One of these penalties, as we have already seen, is the forfeiture of the vessel, for the fraudulent use of a certificate of registry, when she is not actually entitled to the benefit thereof.

The statements of the libel and the evidence in the case which supports them bring the Mohawk within this penalty.

DECREE REVERSED, and the case remanded, with instructions to enter a decree of forfeiture and condemnation of the vessel.

VAN ALLEN *v.* THE ASSESSORS.

1. The act of June 3, 1864, "To provide a national currency," &c., rightly construed, subjects the shares of the banking associations authorized by it, and in the hands of shareholders, to taxation by the States under certain limitations (set forth in its 41st section), without regard to the fact that a part or the whole of the capital of such association is invested in national securities declared by the statutes authorizing them to be "exempt from taxation by or under State authority."
2. The act thus construed is constitutional.
3. The act of 9th March, 1865, of the legislature of New York, sometimes called the Enabling Act, and which enacts that *shares* in any of these national banking associations held by any person or body corporate shall be "included in the valuation of the personal property of such person or body corporate, in the assessment of taxes in the town or ward where such banking association is located and not elsewhere," &c., but which did not provide that the tax imposed should not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State, is not warranted by the act of Congress, and is void: there having been under the legislation of the State no tax laid on *shares* in State banks at all; though there was a tax on the *capital* of such banks.

THIS was a suit involving the question of right, on the part of States, to tax shares in the national banking associations

created under the act of Congress of June, 1864. The case was thus:

By an act passed February 25th, 1863, Congress provided for the organization of national banking associations;* and the act was amended and re-enacted on the 3d June, 1864.†

By these laws the mode of organizing these associations was prescribed, their powers defined, and their duties enjoined. The Secretary of the Treasury was authorized to employ them as depositories of the public moneys, and as financial agents of the government, taking, however, sufficient security for the faithful performance of those duties. The general supervision of their action was committed to a comptroller of the currency, to be appointed by the President on the nomination of the secretary. No association could be organized with a less capital than fifty thousand dollars, or less than one hundred thousand dollars in any place with more than six thousand inhabitants; or less than two hundred thousand dollars in any place with more than fifty thousand inhabitants. The whole capital was required to be paid in within five months; fifty per centum at the commencement, and ten per centum every month thereafter. Of this capital at least one-third was required to be invested in interest-bearing bonds of the United States, which were to be deposited with the treasurer of the United States. Provision was also made for the preparation of circulating notes of different denominations, of uniform general appearance, and for the delivery to each association of an amount of these notes equal to ninety per centum of the amount of bonds deposited with the treasurer. These notes were made payable by the associations to whom they were delivered, and they were required to pay them on demand. To secure more certainly prompt redemption by the several associations of these notes and of deposits, each association was required to keep always on hand an amount of lawful money equal, in certain cities named, to twenty-five per centum, and in other places to fifteen per centum of its outstanding

* 12 Stat. at Large, 668. † 13 Id. 99.

circulation and its deposits; and to accumulate a surplus fund equal to twenty per centum of its capital. In case of default in payment by any association, the notes were to be paid by the United States, and the bonds deposited were to be either cancelled or sold, at the option of the government. The entire amount of note circulation was limited to three hundred millions of dollars, to be apportioned among the associations in the different States and Territories, partly according to the rule of representative population, and partly according to their existing banking capital, resources, and business. The notes were made receivable by all the associations for all debts and liabilities whatever; receivable by all associations employed as depositories, when deposited by the United States; receivable also by the United States for all dues except duties on imports; and by all persons for all dues from the United States, except interest on public debt.

Such are the distinguishing features of the National Banking, or National Currency Act. The general objects of the act are apparent from them.

These associations possess, under the act, all the powers necessary for carrying on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, buying and selling exchange, coin, and bullion; by lending money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act, &c. The duration of the charter is twenty years.

Certain provisions, particularly ascertaining the duties and functions of these national banking associations, may thus be stated:

The persons forming an association are required to make a certificate, which shall specify, among other things, the amount of its capital stock, and the number of shares into which the same shall be divided, the names and places of residence of the shareholders, and the number of shares held by each.* The capital stock is to be divided into shares

* § 6.

of $100 each, and is to be deemed personal property. The shareholders of the association are to be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value, in addition to the amount invested in such shares.* In the election of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him.† Fifty per cent. of the capital stock of every association must be paid in before it shall commence business, and the remainder in instalments of at least ten per cent. per month till the whole amount is paid; and if any shareholder, or his assignee, shall fail to make the payment, or any instalment on his stock, the directors may sell the stock at public auction.‡ No association can make any loan or discount on the security of the shares of its own capital.§

By the 40th section of the act of 1864 it is enacted—the act of 1863 containing no such provision—

"That the president and cashier of every such association shall cause to be kept, at all times, a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted, and such list shall be subject to the inspection of all shareholders and creditors of the association, *and the officers authorized to assess taxes under State authority*, during business hours of each day," &c.

The 41st section, of the same act of 1864, *provides by one part of it for taxation by the United States.* It imposes a tax of one per cent. annually on circulation; one-half of one per cent. on deposits, and then one-half of one per cent. on the capital *beyond the amount invested in United States bonds;* and after prescribing how the duty is to be collected, and the penalty for default, &c., the section proceeds:

(1.) "*Provided*, that nothing in this act shall be construed to

* § 12. † § 11. ‡ §§ 14, 15. § § 35.

prevent all the shares in any of said associations, held by any person or body corporate, from being *included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere*, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. (2.) *Provided further*, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act *shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located.* (3.) *Provided*, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

With this statute of the Federal Government, authorizing banking associations, in force, the legislature of New York, on the 9th March, 1865, passed "an act, enabling the banks of this State to become associations for the purposes of banking, under the laws of the United States."* The act, frequently called "The Enabling Act," imposed a tax upon all shares in national banks, in the hands of their holders. The section laying the tax ran thus:

"§ 10. All the *shares* in any of the said banking associations, organized under . . . the act of Congress, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate or corporation, in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere, whether the holder thereof reside in such town or ward, or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this State, provided that the tax so imposed upon such shares shall not exceed the par value thereof; and provided further, that the real estate of such associations shall be subject to State, county, or municipal taxes, to the same extent, according to the value, as other real estate is taxed."

This act, it will be noted, *laid no rate or tax whatever "upon*

* Session Acts of 1865; chap. 97.

the shares in any of the banks organized under the authority of *the State*," as seems to have been contemplated as necessary by the second proviso of the 41st section of the National Banking Act of 1864; and, indeed, under the legislation of New York, as it appeared, no rate or tax whatever was laid upon *shares* in State banks at all; though there was one laid on their *capital*.

However, assuming the validity of this State law whether with or without this proviso, the Board of Assessors, at the city of Albany, assessed one Van Allen for fifty shares, owned by him, of the capital stock of the First National Bank of that city, and assessed all the other shareholders in like manner for theirs. *At the time of the assessment, the whole capital of the bank was invested in various obligations of the Federal Government; in regard to all of which, Congress had enacted that, "whether held by individuals, corporations, or associations," they should be "exempt from taxation by or under State authority."*

Van Allen and the other stockholders insisted before the board that the shares of the bank held by them, as stockholders, were not subject to assessment and taxation under State authority; that the enabling act of the New York legislature of 9th March, 1865, was repugnant to the Constitution of the United States, and also to the laws of the United States. These positions the board denied, and it enforced the tax which had been assessed. On a case stated by the stockholders on the one side, and the Board of Assessors on the other, the question was now taken to the Supreme Court of the State, and thence to the Court of Appeals. This latter court—the highest court of law or equity of the State—having affirmed the authority of the Board of Assessors to lay the tax, the case came here on error.*

Other cases like it, and represented by counsel, were also here from different places in New York. The magnitude

* Of course, under the 25th section of the Judiciary Act; with whose provisions the reader is familiar. See *supra*, p. 57, The Binghamton Bridge.

of the interests concerned will be readily conceived from the fact mentioned at the bar, that, in December, 1865, the amount of stock in these National Banks, at its par value—and the amount, therefore, either subject or not subject, according as this case should be decided, to taxation by the States—was:

In the State of New York, ...	$115,217,941 00
In the Union, ...	404,159,493 00

That the reader may be possessed not only of the essential case, but of some of its important incidents, it may be well to mention that, prior to the enactment of either of the National Banking laws, and while its State Bank system was in operation, the legislature of New York (A. D. 1857) had enacted that the capital stock of the banks of the State should be "assessed at its actual value, and taxed in the same manner as other personal and real estate of the country." With the State system and the enactment just mentioned in force, several of the banks of New York became, soon after the rebellion broke out, owners of large amounts of the bonds of the United States, and in regard to which, as already said, Congress had, in the statute authorizing them, enacted* that, "whether held by individuals or *corporations*, they shall be exempt from taxation by or under *State* authority." On a question between those banks as formed under the general State system in New York, and the tax commissioners of the State, this court decided, in March, 1863, in the *Bank of Commerce* v. *New York City*,† that the tax referred to was a tax upon the *stock;* and that being so, it was by the settled law of this court—as declared in *Weston* v. *The City of Charleston;*‡ *McCulloch* v. *The State of Maryland;*§ *Osborne* v. *The Bank of the United States*‖ (well known decisions of this court, and in which MARSHALL, C. J., had given its judgment), and other cases—illegally imposed.

In April, 1863, just after this decision, the legislature of New York passed *another* statute,¶ which enacted that "all

* Act of February 25, 1862.
† 2 Black, 620.
‡ 2 Peters, 449.
§ 4 Wheaton, 316.
‖ 9 Id. 738.
¶ Act of 29th April, 1863.

banks, &c., should be liable to taxation on a *valuation equal to the amount of their capital stock paid in, or secured to be paid in*, &c., in the manner now provided by law," &c. On a tax laid, under *this* act, by the commissioners, upon the different banks of New York city, some of which had invested their whole capital in the securities of the Federal Government, and others of which had largely done so, the question was, whether this second act did or did not also impose a tax upon the *stock?* This court, on appeal from the highest court of the State, decided, in the beginning of 1865, in what is known as the *Bank Tax Case*,* that it did. It was within a few days after that decision that the enactment on which the present case arose—a third enactment in the principal matter—was made. Its language was obviously directed to avoid some difficulties which had proved insurmountable in the *Bank Tax Case*, and in cases before it. Whether it did really avoid them, or whether the new legislation of the State had the fault of exalting the forms and phrases of legislation above its substance and effect, was, in fact, one great question in the case; others being (i) whether Congress had meant, by the first proviso to the 41st section of the act of 1864, to authorize States to lay a tax on shares in National Banks whose whole capital consisted of national securities, declared in the laws authorizing them to be exempt from taxation by States; and (ii) whether, if it did, such an act would or would not be open to the objection of being an attempt by Congress to deliver over to others, powers vested by the Federal Constitution in it alone; and be, therefore, an act unconstitutional.

A minor question—treated preliminarily—was, whether, admitting the power of the State, under the provisos of the 41st section of the act of Congress, to tax the shares by an enactment framed with the limitations prescribed by the three provisos in it, this particular act of the State of New York, passed March 9, 1865, which apparently omitted the second one, was an enactment of the kind required?

* 2 Wallace, 200.

Numerous counsel appeared in the matter; some in this immediate case, others in other cases just like it from the other places. Among them *Mr. Evarts*, *Mr. Sedgwick*, *Mr. Tremaine*, *Messrs. Edmonds* and *Miller*, argued against the right of the States to tax, and *Mr. Kernan*, *Mr. A. J. Parker*, and *Mr. Reynolds* in favor of it. After naming such counsel it need not be remarked that everything possible to be well said was said as well as possible. The fact that the main matter is fully and admirably argued from the bench—in the opinion of the court on the one hand, and in the opinion delivered in behalf of the judges who did not concur in it on the other—renders it unnecessary for the reporter to present the discussion at the bar.

Mr. Justice NELSON delivered the opinion of the court.

The decree of the Court of Appeals, from which this case comes to us, must be reversed, on the ground that the enabling act of the State of New York, passed March 9, 1865, does not conform to the limitations prescribed by the forty-first section of the act of Congress, passed June 3, 1864, organizing the national banks, and providing for their taxation. The defect is this: one of the limitations in the act of Congress is, "that the tax so imposed under the laws of any State upon the shares of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located." The enabling act of the State contains no such limitation. The banks of the State are taxed upon their capital; and although the act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the State banks may consist of the bonds of the United States, which are exempt from State taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders.

This is an unimportant question, however, as the defect may be readily remedied by the State legislature.

The main and important question involved, and the one

which has been argued at great length and with eminent ability, is, whether the State possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States?

The court are of opinion that this power is possessed by the State, and that it is due to the several cases which have been so fully and satisfactorily argued before us at this term, as well as to the public interest involved, that the question should be finally disposed of. I shall proceed, therefore, to state, as briefly as practicable, the grounds and reasons that have led to their judgment in the case.

The first act providing for the organization of these national banks, passed 25th February, 1863, contained no provision concerning State taxation of these shares; but Congress reserved the right by the last section at any time "to amend, alter, or repeal the act." The present act of 1864 is a re-enactment of the prior statute, with some material amendments, of which the section concerning State taxation is one.

It will be readily perceived, on adverting to the act, that the powers and privileges conferred by it upon these associations are very great powers and privileges;—founded upon a new use and application of these government bonds, especially the privilege of issuing notes to circulate in the community as money, to the amount of ninety per centum of the bonds deposited with the treasurer; thereby nearly doubling their amount for all the operations and business purposes of the bank. This currency furnishes means and facilities for conducting the operations of the associations, which, if used wisely and skilfully, cannot but result in great advantages and profits to all the members of the association—the shareholders of the bank.

In the granting of chartered rights and privileges by government, especially if of great value to the corporators, certain burdens are usually, if not generally, imposed as conditions of the grant. Accordingly we find them in this charter. They are very few, but distinctly stated.

They are, first, a duty of one-half of one per centum each half year, upon the average amount of its notes in circulation; second, a duty of one-quarter of one per centum each half year upon the average amount of its deposits; third, a duty of one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds; and fourth, a State tax upon the shares of the association held by the stockholders, not greater than assessed on other moneyed capital in the State, nor to exceed the rate on shares of stock of State banks.

These are the only burdens annexed to the enjoyment of the great chartered rights and privileges that we find in this act of Congress; and no objection is made to either of them except the last,—the limited State taxation.

Although it has been suggested, yet it can hardly be said to have been argued, that the provision in the act of Congress concerning the taxation of the shares by the State is unconstitutional. The suggestion is, that it is a tax by the State upon the bonds of the government which constitute the capital of the bank, and which this court has heretofore decided to be illegal. But this suggestion is scarcely well founded; for were we to admit, for the sake of the argument, this to be a tax of the bonds or capital stock of the bank, it is but a tax upon the new uses and new privileges conferred by the charter of the association; it is but a condition annexed to the enjoyment of this new use and new application of the bonds; and if Congress possessed the power to grant these new rights and new privileges, which none of the learned counsel has denied, and which the whole argument assumes, then we do not see but the power to annex the conditions is equally clear and indisputable. The question involved is altogether a different one from that decided in the previous bank cases, and stands upon different considerations. The State tax, under this act of Congress, involves no question as to the pledged faith of the government. The tax is the condition for the new rights and privileges conferred upon these associations.

But, in addition to this view, the tax on the shares is not

a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of the *Queen* v. *Arnoud*.* The question related to the registry of a ship owned by a corporation. Lord Denman observed: "It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners."

The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed, as will be seen on referring to it.

That act provides as follows:

"That nothing in this act shall be construed to prevent all the shares of any of the said associations, held by any person or body corporate, from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by and under State authority, at the place where such bank is located, and not elsewhere, but not *at a greater rate than is assessed upon other moneyed capital in the hands*

* 9 Adolphus & Ellis, New Series, 806.

of individual citizens of such State; PROVIDED *further, that the tax so imposed under the laws of any State, upon the shares of the associations, authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located*: PROVIDED, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real estate is taxed."*

It is said that Congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution, and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from Congress. We agree to this. But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act. An example of this relation existing between the Federal and State governments is found in the pilot-laws of the States, and the health and quarantine laws. The power of taxation under the Constitution as a general rule, and as has been repeatedly recognized in adjudged cases in this court, is a concurrent power. The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the Federal Government.

The remaining question is, has Congress legislated in respect to these associations, so as to leave the shares of the stockholders subject to State taxation?

We have already referred to the main provision of the act of Congress on this subject, and it will be seen it declares "that nothing in this act shall be construed to prevent *all the shares* in any of the said associations, held by any person, or body corporate, from being included in the valuation of

* § 41.

the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located:" and in another section of the act* it is declared "that the president and cashier of every such association shall cause to be kept, at all times, a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted, and such list shall be subject to the inspection of all shareholders and creditors of the association, *and the officers authorized to assess taxes under State authority*, during business hours of each day," &c.

These two provisions—the one declaring that nothing in the act shall be construed to prevent the shares from being included in the valuation of the personal property, &c., in the assessment of taxes imposed by State authority; and the other providing for the keeping of the list of the names and residences of the shareholders, among other things, for the inspection of the officers authorized to assess the State taxes—not only recognize, in express terms, the sovereign right of the State to tax, but prescribe regulations and duties to these associations, with a view to disembarrass the officers of the State engaged in the exercise of this right. Nothing, it would seem, could be made plainer, or more direct and comprehensive on the subject. The language of the several provisions is so explicit and positive as scarcely to call for judicial construction.

Then, as to the shares, and what is intended by the use of the term? The language of the act is equally explicit and decisive.

The persons forming an association are required to make a certificate, which shall specify, among other things, the amount of its capital stock, and the number of shares into which the same shall be divided, the names and places of residence of the shareholders, and the number of shares held by each.† The capital stock shall be divided into shares of

* 40 † § 5.

one hundred dollars each, and shall be deemed personal property. The shareholders of the association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value, in addition to the amount invested in such shares.* In the election of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him.† Fifty per centum of the capital stock of every association shall be paid in before it shall commence business, and the remainder in instalments of at least ten per centum per month till the whole amount is paid; and if any shareholder, or his assignee, shall fail to make the payment, or any instalment on his stock, the directors may sell the stock at public auction.‡ No association shall make any loan or discount on the security of the shares of its own capital.§

We have already referred to the list of the names and residences of the shareholders, and the number of shares, to be kept for the inspection of the State assessors.

Now, in view of these several provisions in which the term shares, and shareholders, are mentioned, and the clear and obvious meaning of the term in the connection in which it is found, namely, the whole of the interest in the shares and of the shareholders; when the statute provides, that nothing in this act shall be construed to prevent *all the shares* in any of the said associations, &c., from being included in the valuation of the personal property of any person or corporation in the assessment of taxes imposed by State authority, &c., can there be a doubt but that the term "shares," as used in this connection, means the same interest as when used in the other portions of the act? Take, for examples, the use of the term in the certificate of the numbers of shares in the articles of association, in the division of the capital stock into shares of one hundred dollars each; in the personal liability clause, which subjects the shareholder to an

* § 12. † § 11. ‡ §§ 14, 15. § § 35.

amount, and, in addition, to the amount invested in such shares; in the election of directors, and in deciding all questions at meetings of the stockholders, each share is entitled to one vote; in regulations of the payments of the shares subscribed; and, finally, in the list of shares kept for the inspection of the State assessors. In all these instances, it is manifest that the term as used means the entire interest of the shareholder; and it would be singular, if in the use of the term in the connection of State taxation, Congress intended a totally different meaning, without any indication of such intent.

This is an answer to the argument that the *term*, as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the State assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction.

Upon the whole, after the maturest consideration which we have been able to give to this case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization. But, for the reasons stated in the forepart of the opinion, the judgment must be reversed and the case remitted to the Court of Appeals of the State of New York, with directions to enter judgment for the plaintiffs in error, with costs.

The CHIEF JUSTICE delivered the following opinion in his own behalf, and in behalf of Associate Justices WAYNE and SWAYNE:

The court is unanimous in the opinion that the judgment of the Court of Appeals of New York must be reversed, be-

cause the shares of the national banking associations are not taxed by the law of New York according to one branch of the rule prescribed by the act of Congress; that is to say, as the shares of the banks of the State are taxed.

A minority of the members of the court, however, is unable to concur upon one very important point, with the opinion just read.

That opinion maintains the proposition, that under the national currency acts, the shares of the capital of national banking associations are subject to State taxation without any reference to the amount of such capital invested in bonds of the United States.

We think that such taxation is actual, though indirect, taxation of the bonds; that it is matter of doubt whether, under the Constitution, Congress has power, without express reservation in the loan acts, to authorize such taxation; and that taxation by the States of the shares of national banking associations, without reference to the amount of the capital invested in national securities, is not authorized, nor was intended to be authorized by Congress.

We will proceed to state the grounds of this opinion.

By an act passed February 25th, 1863, Congress provided for the organization of national banking associations for the purpose of enabling the national government to execute more effectually its constitutional powers and functions; and the act was amended and re-enacted on the 3d June, 1864.

It is unnecessary to examine minutely the various provisions by which the powers and duties and functions of these national banking associations are particularly ascertained and regulated. The general purpose of the act of Congress cannot be misconceived. It is to authorize the organization of associations to be employed, not only in the service of the government as depositories and financial agents, but especially in facilitating the collection of internal duties, and the transfer and disbursement of public moneys, and in furnishing to the people a safe and uniform note circulation, convertible immediately into notes of the United States, and to be made convertible into coin as soon as the

government shall provide for the payment of its own notes in that medium.

The qualities, powers, and duties, as national agencies, of these associations, resemble, in almost all essential particulars, those of the Bank of the United States authorized by the act of April 10th, 1816. Like that bank, they are organized under national legislation. Their capital, like four-fifths of the capital of that bank, is supplied by individual subscriptions. They are employed, like that bank, as agents and depositories of the national government.

While that bank, however, was organized as one great moneyed corporation, with power to establish branches in the several States, subject to its central power, these associations, under the limitations prescribed by Congress, are formed whenever and wherever citizens, possessing the necessary means, see fit to organize under the law; and they are subject to no control except that of the government executing the law. It is also to be remembered that while the notes of that bank represented nothing but securities held by the bank itself, and were expected to form but a small part of the note circulation of the country, the notes of these associations, besides being secured as to immediate redemption by the several associations, which pay them out, through the deposit of United States bonds, are, in substance and to all practical intents, the obligations of the government itself; and are intended, in connection with the notes issued directly by the government, to supply the entire note circulation of all the States and all the Territories of the Union.

These observations show that the national banking associations are much more intimately connected in their functions and operations with the national government, than was the Bank of the United States. They are, therefore, entitled to all the protection and all the immunities to which that bank was entitled.

The relations of that bank to the government, and its right to protection from State interference and control, were fully considered in the case of *McCulloch* v. *The State of Mary-*

land, decided in 1819, and again in the case of *Osborne* v. *The Bank of the United States*, decided in 1824.

That Congress may constitutionally organize or constitute agencies for carrying into effect the national powers granted by the Constitution; that these agencies may be organized by the voluntary association of individuals, sanctioned by Congress; that Congress may give to such agencies, so organized, corporate unity, permanence, and efficiency; and that such agencies in their being, capital, franchises, and operations, are not subject to the taxing power of the States, have ever been regarded, since those decisions, as settled doctrines of this court.

Those decisions were the judgments of great men and great judges. They were pronounced by the most illustrious of their number, and are distinguished by his peculiar clearness and cogency of reasoning. For nearly half a century the principles vindicated by them have borne the keen scrutiny of an enlightened profession, and the sharp criticism of able statesmen; and they remain unshaken. All the judges who concurred in them have descended, long since, into honored graves; but their judgments endure, and, gathering vigor from time and general consent, have acquired almost the force of constitutional sanctions.

We assume, then, that the national banking associations, as such, and in their powers, functions, and operations, are not subject to taxation by the States, on the ground that State laws imposing such taxation are repugnant to the law of Congress by which they are established and sanctioned.

The same principle of exemption was applied in 1829, by a judgment of this court in the case of *Weston* v. *The City of Charleston*,* to the bonds and other securities of the United States in the hands of individuals. The opinion was delivered by the same great judge who pronounced the two former judgments, and the doctrine was summed up thus:

"The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on

* 2 Peters, 449.

the credit of the United States, and consequently to be repugnant to the Constitution; and this doctrine has ever since been maintained as settled law."

More recently the same principle has been applied generally to the taxation of the capital of associations and corporations, so far as invested in national securities.

This was first done in the case of the *Bank of Commerce* v. *New York*.* The legislature of New York imposed taxes on banking capital as upon other real and personal property of individuals according to valuation. This court held that the bonds and other securities of the United States, included in such valuation, were not liable to be taxed by State authority.

The legislature of New York subsequently provided for the taxation of the capital of banks by an arbitrary valuation; that is to say, by requiring the valuation for taxation to be equal to the sum of the capital paid in and secured to be paid in, without reference to its actual value at the time of valuation; and it was then insisted, in behalf of the State commissioners of taxes, that this was a tax on the franchise and not on the property, and that no inquiry could be made, therefore, as to the component elements of the capital, with a view to ascertain whether any of them were exempt from taxation. But this court held that the tax was really on the property of the bank, and could not be constitutionally assessed upon that part of it which consisted of national bonds and securities.†

And it may now be regarded as settled law that the national securities forming part of the property of individual citizens or associations, or of the capital of banks or banking associations, are not subject to taxation by or under State authority.

But it was urged in argument that, though the capital of a bank, so far as it consists of national securities, is exempt from State taxation, the shares of that capital may be taxed

* 2 Black, 628. † Bank Tax Case, 2 Wallace, 200.

without reference to the legislation of Congress, and without regard to the national securities which they represent.

If this were admitted, it would follow that the legislature of New York, by merely shifting its taxation from the capital to the shares, might have avoided the whole effect of the exemptions sanctioned by the decisions just cited. The same tax on the same identical property, without any exemption of national securities, might have been assessed and collected by adopting the simple expedient of assessment on the shares of capital, instead of the aggregate of capital—on the parts instead of the whole. The whole tax, too, might have been collected from the very same officers who were authorized by those decisions to refuse payment of so much of it as was derived from national securities, by adopting the equally simple expedient of requiring those officers to deduct the tax on the shares from the accruing dividends, and pay it over to the State collector.

We do not understand the majority of the court as asserting that shares of capital invested in national securities could be taxed without authority from Congress. We certainly cannot yield our assent to any such proposition. To do so would, in our judgment, deprive the decisions just cited of all practical value and effect, and make the exemption from State taxation of national securities held by banks as investments of capital wholly unreal and illusory.

We will consider the question, therefore, as one of construction.

The majority of the court hold that the act of Congress, rightly construed, subjects the shares of the national associations to taxation by the States, without regard to investment of a part or the whole of their capital in national securities; and that the act thus construed is warranted by the Constitution. We dissent.

It may be well questioned, in our judgment, whether Congress has power under the Constitution to authorize State taxation of national securities, either directly or indirectly. Taxation of national securities is taxation upon the contracts of the United States, and may be regarded, not unrea-

sonably, as impairing their obligation, unless provision is made for such taxation in the laws authorizing the loans for which they are issued. It is not alleged that any such provision is contained in the acts under which the government issued the bonds held by the national banking associations. On the contrary, these acts contain express stipulations with the national creditors that the bonds issued under them shall be exempt from taxation by or under State or municipal authority. This is, in effect, a stipulation on the part of Congress that the takers of the government loan shall have the right to use the bonds issued to them for any lawful purpose, free from State or municipal taxation.

Can Congress, notwithstanding this stipulation, authorize States to tax these bonds indirectly by taxing the capital or the shares of capital invested in them?

There is sufficient reason, we think, for a negative answer, to make it our duty not to presume without the clearest evidence that Congress has actually authorized such taxation. And were the power to authorize such taxation clear, a superior question would remain,—the question of good faith, of public virtue, of national honor.

We come, then, to the construction of the act.

In enacting the National Bank Law, Congress must have had in view the great principles already established by the decisions of this court: (1) that States cannot tax the agencies of the national government; (2) that States cannot tax the national securities in the hands of individual citizens; (3) that States cannot tax the national securities in which may be invested the whole or a part of the capital of any association or corporation.

They also had in view, doubtless, the exception to exemption suggested by Chief Justice Marshall, in *McCulloch* v. *Maryland*, when he said that the opinion of the court did "not extend to a tax paid by the real property of the bank in common with the real property within the State, nor to a tax imposed on the interest which the citizens of Maryland might hold in the institution in common with the property of the same description throughout the State."

With these principles and this exception in view, Congress, in order that nothing might be left to inference, expressly authorized State taxation of the real estate held by the national banking associations, and of the interest of private citizens in them. This was done by three provisos to the forty-first section, which prescribed the measure and rule of national taxation. These provisos are as follows:

(1.) "*Provided*, that nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. (2.) *Provided further*, that the tax so imposed under the laws of any State shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located. (3.) *Provided also*, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

We do not doubt the power of Congress to enact these provisos. The only ground upon which exemption from State taxes of the capital, franchises, operations, or property of corporations or associations has been adjudged by this court, is that of the repugnancy of such taxation to the acts of Congress organizing such corporations or associations, and making them the agencies or instruments of the national government.

The doctrine is, that Congress may create corporations or authorize associations, as means, instruments, or agents for the execution of national powers, and that such corporations or associations, being such means, instruments, or agents, are exempted from State taxation. But such corporations and associations must be organized in such manner, under such limitations, and with such liabilities as Congress may see fit to prescribe. If in the judgment of Congress, there-

fore, the purposes of their organization will be better, or more safely fulfilled if subjected, in some respects, to State taxation, the acts authorizing their establishment may be so framed as to allow such taxation, excepting, probably, national securities, as already suggested.

We proceed to consider the effect of these provisos; pausing only to observe that there is nothing in the suggestion of Chief Justice Marshall, in conformity with which they were probably framed, which warrants any inference that it ever entered into his mind that the national stock or bonds could be taxed indirectly, by taxing the interest of citizens in the Bank of the United States. The question of State taxes upon national securities was not at all considered in that case. If it had been, we cannot doubt that the clear intelligence, under the inspection of which all propositions seemed to resolve themselves into their elements, would have detected taxation of bonds under the disguise of taxation of the capital or shares of capital in which they were invested, and would have pronounced against the indirect as decisively as it did afterwards, in *Weston* v. *Charleston*, against the direct taxation.

What, then, was the intent of Congress? We think it not very difficult to collect it from the provisos.

In most of the States, if not in all, the personal property of all individuals and corporations is listed, valued and assessed by public officers under legislative authority. The first proviso simply requires that the shares of individuals in national banking associations shall be included in this valuation and assessment; and, inasmuch as personal property of different descriptions is often valued and assessed by different rules, it further requires that it shall not be so included at a greater rate than is assessed upon other moneyed capital in the hands of citizens. The second proviso merely introduces another standard, by comparison with which the taxation of these shares is to be regulated, and requires that the tax imposed on them shall not exceed the rate imposed by the State on the shares of banks organized under its authority.

We think this the plain sense of these provisos. They adopt the exception admitted by Chief Justice Marshall to the rule of exemption in *McCulloch* v. *Maryland*. They subject the interests held by citizens in the national banking associations to a tax in common with other property of the same description, and they give to the exception a practical application by determining what property is of the same description with the interest to be taxed in common with it.

Now, by taxation in common, we understand taxation by a common rule and in equal degrees. To tax the shares of citizens in these associations by other rules, or in greater degrees than other like property, would as effectually retard, impede, burden, and control the operation of the national currency act as to tax the associations themselves or their lawful operations, and would be clearly unwarranted by the Constitution.

What then is the rule, and what the degree in which taxes can be imposed by the States on moneyed capital in the hands of individual citizens?

So far as that capital consists of ordinary funds or securities acquired or held under the laws of the States, the measure of taxation must necessarily be determined by the discretion of the State legislature. The responsibility of their members to the people, their own interests in common with those of their constituents, their knowledge, their justice, and their wisdom must be relied on for security against injustice. But so far as that capital consists of bonds or other securities of the United States, it cannot be taxed at all by State authority in the hands of individual citizens. That portion is exempted by the Constitution, as interpreted by this court in the cases already cited.

Here, then, we have the common rule and common degree of taxation applicable alike to shares in national banking associations and to moneyed capital in the hands of individuals. That proportion of each which is liable to taxation must be taxed alike; that proportion of each which is exempt under the Constitution must not be taxed at all by State authority. Taxation of the former by no greater rate

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than the latter, means equal taxation for both. Any construction of the proviso which denies the same exemptions to the proportion of the shares invested in national securities, which it concedes to the like proportion of other moneyed capital invested in like manner, seems to us manifestly at variance with the declared intention of Congress.

But, it is insisted that the shares of capital may be taxed by another rule than that which governs the taxation of other moneyed capital, because of something peculiar in the nature of shares. It is said, that the association owns the capital, and that the shareholders have no control over this property except through the choice of officers, directors, or agents, and no right to the property except the right to receive a due proportion of the earnings of the association while it exists, and a similar proportion of the property after its dissolution.

It is true that the shareholder has no right to the possession of any part of the corporate property while the corporation exists and its affairs are honestly managed. He has committed his interest, for a time, to the possession and control of the corporation of which he is a member, and he has only a member's voice in the management of it.

So a man who has leased a farm has no right to possession or control during the lease; but who denies his property in the farm? And if a dozen owners join in the lease, has not each one an interest in the property to the extent of one-twelfth?

So, if for the time the property of the shareholder is placed beyond his direct control, and converted into property of the association, how can that circumstance affect the intrinsic character of his shares as shares of the whole corporate property? How can a man's shares of any property be the subject of valuation at all if not with reference to the amount and productiveness of the property of which they are a part? What value can they have except that given them by that amount and that productiveness? A certificate of title to a share is not a share. It is evidence of the shareholder's interest. His interest may be transferred by the transfer of

the certificate; but it is not the certificate that is valued when the worth of the share is estimated either by the speculator in the market, or by the tax assessor. It is the property which it represents that is valued, by the speculator often with reference to speculation only, but by the public officer, always, if he does his duty, by the real worth of the property, all things considered.

It is said, also, that the taxation of the shares by the States was intended as part of the price of the privileges granted to the associations by Congress, and especially for the new use allowed to be made of the bonds by depositing them as security for the redemption of the circulating notes issued to the associations by the government.

But while we see privileges granted in the act to these associations, in order that they may fulfil the public purposes of their organization, and while we see that these privileges may enhance the value of the capital invested and consequently the value of the shares, we see no new use allowed to be made of the bonds. It has been common in many States, of late years, to require banks of circulation to secure prompt redemption by securities deposited with the State officers, and among such securities preference is usually given to bonds of the United States. But this is for the benefit and security of the note-holders, not of the banks. The requirement restricts rather than increases the amount of their circulation.

These privileges, moreover, and the new use, if there be one, are granted directly to the associations, and only indirectly to the shareholders; and if the right to tax is to be inferred from consent manifested by organization under the act, the tax should be imposed on the capital of the associations rather than upon the shares. And we may remark, also, that the imagined new use is restricted to the limited amount of bonds required as security for circulation, while the greater part of the bonds, held by the associations, are not so pledged at all, and no such reason as new use or special privileges can be alleged for denying exemption to them.

It is worthy of notice, that the banks of New York, whose

claim to the exemption of the bonds held by them from State taxation was held valid by the two decisions we have cited, were organized upon the same principles with the national banking associations which now claim a similar exemption. The same privileges, substantially, were conferred on those institutions by the laws of New York as are conferred on these by act of Congress. The former were allowed to issue an amount of currency proportioned to the bonds deposited by them with the bank superintendent, just as the latter are allowed to issue an amount proportioned to the bonds deposited by them with the treasurer of the United States. If the tax is the price of privilege in the case of the latter, so it must have been in the case of the former. If it is a duty on the new use of bonds by national banking associations, it was a duty on the same new use by the New York banks. If consent of the former to taxation could be inferred from organization, so could the consent of the latter. And yet it was held, in the New York bank cases, that the tax could not reach the bonds which made a part of the capital, while it is now held that it may be imposed on the shares of the capital invested partly or wholly in these bonds. Surely no argument drawn from new use or price of privilege can be valid for the latter tax which was not valid for the former.

The truth is, we think that Congress, when providing for State taxation of shares, had no reference whatever to any new use of bonds or any price of privilege. The national legislature was engaged in providing a uniform currency for the whole country, and for its circulation and redemption. For this and other great national purposes the organization of the national banking associations was authorized, and it was expected that these associations would take the place of the State banks, from taxes on which the States derived considerable revenues. It was to remove the objections to the new system, founded on the loss of this revenue through the conversion of State banks into national associations, that Congress authorized the taxation of shares by the States. This taxation should be allowed to the extent of

the concession of Congress. That concession limits it to the same taxation as the States impose on moneyed capital in the hands of individuals, in whose hands the proportion invested in national bonds is exempt. There is no reason for extending taxation on shares beyond that concession.

But it is urged that other provisions in the act of Congress require that construction of the proviso which allows taxation on shares without deduction of investments in national securities. We think otherwise.

One of these provisions is that which requires the capital to be divided into shares of one hundred dollars each. This provision only shows that, at the outset, each share of paid up capital represented a property interest in the association, bearing the same proportion to the whole that one hundred dollars bore to the entire capital.

The only other provision much relied on as favoring the construction of the majority, is that clause of the fortieth section which requires the officers of the several associations to keep correct lists of the names and residences of the shareholders, subject to the inspection of shareholders and creditors, and of the officers authorized to assess taxes under State authority. But is it not obvious that this list would be as useful to the State officers in valuing the shares with exemption of bonds, as in valuing them without exemption?

It is said that exemption would embarrass valuation. How? All the assessor would have to do, would be to ascertain the value of the whole property of the association and deduct the amount of bonds. The remainder, divided by the number of shares, would give the value of each share to be taxed. And the assessor must value the whole property and divide it by the number of shares, in order to make a true valuation of shares. If he does not do this, he must assess the shares at an arbitrary or speculative valuation. This is not what is required. The law demands true valuation; and true valuation, with deduction of bonds, places the shareholder on exact equality with the holder of other moneyed capital, which the law also demands. No other mode of valuation secures that equality.

There is another provision of the act which appears to us conclusive of the correctness of our view. It is that clause of the 41st section which provides for taxation by the United States. It imposes a tax of one per centum annually on circulation; one-half of one per centum on deposits; and, then, one-half of one per centum on the capital, beyond the amount invested in United States bonds. Is it possible that Congress observed so scrupulously the obligations of good faith as to refuse to tax capital invested in bonds for national purposes, and this in the midst of war, and was yet so negligent of those obligations as to allow the same capital invested in bonds to be taxed in shares, for State purposes? Can it be supposed that Congress, having undoubted power to tax national securities, refrained from exercising it because its exercise would be inconsistent with good faith, and yet intended, by ambiguous phrases, and in the exercise of questionable constitutional authority, to authorize such taxation by the States who, without such authority, could not impose it at all? Suppose that, by this clause, Congress had imposed double the amount of tax actually assessed, and had provided for the payment of half of it to the States. That would have provided an indemnity to the States for the loss of taxes on the State banks, and would have subjected the national bonds to no tax. Is it reasonable to believe that Congress intended to adopt another mode of indemnity, which, by indirection, would subject those bonds to heavy taxation, and that by the States?

To us these questions seem to answer themselves. We are entirely satisfied that the construction of the proviso and the rule for valuation of shares, which we have endeavored to vindicate, is the true one, and the only one consistent with sound principle and perfect faith. We dissent, on this point, from the majority of the court with reluctance; but we are constrained to dissent.

We concur with the majority of the court as to the effect of the second proviso.

The laws of New York, brought under review in the case before us, provide for the taxation of the shares of the na-

tional banking associations, and for the taxation of the capital of State banks, but not of the shares; while the second proviso of the act of Congress requires that the tax on the shares of the former shall not exceed the tax on the shares of the latter. It is clear that this taxation by the State is not in accordance with the authority given by Congress. The variance might not be a matter of much practical importance, if we agreed in opinion that taxation on capital and shares must be by the same rule; but the application of the rule of exemption, heretofore sanctioned, to the capital of the State banks, while the rule denying exemption, which is now announced, is applied to the national associations, would work great and manifest injustice. We think, moreover, that the second proviso is a substantive part of the act which cannot be disregarded, and that it withholds from States, whose policy does not allow the organization of banks and provide for the taxation of shares, the authority to tax the shares of the national banking associations.

It is hardly necessary to add, that we agree that the judgments of the Court of Appeals, in the three cases before us, must be reversed. But we think they should be reversed on the ground that the taxation of New York is repugnant to the first proviso as well as to the second.

JUDGMENT REVERSED, and the case remitted to the Court of Appeals of the State of New York, with directions to enter judgment for the plaintiffs in error, with costs.

THE ADMIRAL.

1. A case in prize, carried by appeal from a District Court into a Circuit Court, before the statute of March 3, 1863, allowing appeals in prize directly from the District Courts to this court, is properly here on appeal from the Circuit Court.
2. A vessel setting sail from England on the 9th September, 1861, with actual knowledge of a proclamation which the President of the United

Statement of the case.

States made on the 19th of the April preceding,—that is to say, made nearly five months previously,—declaring that certain of our Southern States were in insurrection, and that a blockade would be established of their ports,—had no right, under an allegation of a purpose to see if the blockade existed, to sail up to one of those ports actually blockaded.

3. The declaration in the President's proclamation of the date just mentioned, that if a vessel, with a view to violate the blockade, should approach or attempt to leave either of the said ports, she would be "duly *warned* by the commander of the blockading vessels, who would indorse on her registry the fact and date of such warning;" and that if the same vessel "shall *again* attempt to enter or leave the blockaded port she will be captured," does not apply to such a case; but the vessel is liable without any previous warning.

4. Mere sailing for a blockaded port is not an offence; but where the vessel has a knowledge of the blockade, and sails for the blockaded port with the intention of violating it, she is clearly liable to capture.

5. Where, during our civil war, the clearance of a vessel expressed a neutral port to be her sole port of destination, but the facts showed that her primary purpose was to get cargoes into and out of a port under blockade,—the outward cargo, if got, to go to the neutral port named as the one cleared for,—the fact that the vessel's letter of instructions directed the master to call off the blockaded port, and, if he should find the blockade still in force, to get the officer in command of the blockading ship to indorse on the ship's register that she had been warned off (in accordance with what it was asserted by the owners of the vessel was their understanding of neutral rights under the President's proclamation above mentioned), and *then* to go to the port for which this clearance called—will not save the vessel from condemnation as prize in a case where she has been captured close by the blockaded port, standing in for it and without ever having made an inquiry anywhere whether the port was blockaded or not. Presumption of innocent purpose is negatived in such a case.

ON the 19th April, 1861—seven days after Fort Sumter was fired on, and near the beginning, therefore, of our late civil war—the President of the United States issued a proclamation, by which he declared that an insurrection existed in certain of the Southern States, and that he deemed it advisable "to set on foot a blockade of the ports within the said States." "For this purpose," the proclamation proceeded, "a competent force *will* be posted so as to prevent entrance and exit of vessels from the ports aforesaid." "If, therefore," the document continued, "with a view to violate such blockade, a vessel shall approach, or shall attempt to

leave either of the said ports, *she will be duly warned by the commander of one of the blockading vessels, who will indorse on her registry the fact and date of such warning;* and if the same vessel shall *again* attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port, for such proceedings against her and her cargo as may be deemed advisable."

Among the ports included with the proclamation was the port of Savannah, Georgia.

On the 9th September, 1861—that is to say, *five months after the proclamation was published*, and the English having knowledge of it—the British ship Admiral was chartered at Liverpool by the firm of W. & R. Wright, of the British province of New Brunswick, to proceed with a cargo of salt "off the port of Savannah, and, if the blockade is raised, then to proceed into port, and deliver the salt according to her bill of lading; and if the blockade be *not* raised, then the ship to proceed to St. Johns, New Brunswick, and there deliver the same, with the usual despatch of the port." The stipulated freight was thirty shillings per ton, if the cargo should be landed at *Savannah*, and fifteen shillings per ton, if landed at *St. John's*.

The owners' *letter of instructions* to the master, inclosing the charter-party, and referring to our civil war, ran thus:

"The inclosed charter with the Messrs. Wright will show you nature of the voyage. These gentlemen, like many others, hold the opinion that this unfortunate contest cannot last long, it being so obviously the interest of both parties to bring it to a close. This being so, and their being very wishful to have a cargo of pitch-pine from Savannah to St. John, so soon as the port is again opened, is our great reason for their making it a condition in taking the ship, that she should go off Savannah, so that, if possible, they might have the very first shipment of timber. Of course, in calling off, you will endeavor to meet the blockading ship (if the blockade is found to exist still), and then get the officer in command to indorse on your register that the ship has been warned off. This will be all that is necessary for us, as owners of the ship, to justify your departure for St.

John's, and there consigning the ship to the Messrs. Wright, to whom, in the meantime, we will write respecting you.

"*You will distinctly understand, therefore, that you run no risk whatever with the ship, but rather endeavor to satisfy yourself as to the blockade, and then find out the man-of-war, report yourself, and get the register indorsed.* You will, no doubt, speak some vessels when approaching the American coast, so as to ascertain exactly the state of matters, *and be guided thereby in such way as not to infringe the blockade regulation.*"

Under this charter-party and this letter of instructions, the Admiral sailed from Liverpool, upon a direct course for Savannah, on the 12th of September, 1861. *Her certificate of clearance on board expressed St. John's, New Brunswick, as the sole port of her destination.*

On the 11th December, 1861, when about thirty miles off Tybee Island—an island that lies near the entrance to Savannah—the vessel was boarded by a ship of the blockading squadron. At this time she was standing directly for the port of Savannah, the same being then under efficient blockade, and the boarded vessel having made no inquiry anywhere, after leaving Liverpool, as to whether the blockade existed. At this time *Port Royal*, one of the ports of the Southern coast, and some distance above Savannah, was in our possession, having been taken by our squadron on the 7th of November preceding. This fact, however, was not known to those aboard the Admiral. When hailed, she made no resistance. On being boarded she produced her clearance for St. John's (which was more than a thousand miles from the place she then was), along with her letter of instructions; and professed that, in coming to the region in which she was, her purpose was to ascertain whether the blockade was raised, as she supposed when leaving England that it would be; numerous predictions to that effect having been made before she left England, as also confident assertions that the Federal Government would find it impossible to blockade effectively the Southern coast, three thousand miles in length. She declared her readiness, on having a notice and warning indorsed on her registry—as the procla-

mation of the President contemplated that, in such a case as hers, notice and warning should be indorsed—to proceed to St. John's, in accordance with what her letter of instructions contemplated she should do, if she found the blockade existing, and had "notice" and "warning" indorsed accordingly.

This was not satisfactory to the blockading officers, and the vessel was brought in to Philadelphia, and proceeded on, with her cargo, in the District Court there, for prize. The vessel was claimed by a certain Fernie & Co., of Liverpool, England, and the cargo by W. & R. Wright, already mentioned as of St. John's, all the claimants being British subjects.

The District Court restored the cargo but condemned the vessel. From this condemnation Fernie & Co., her claimants, appealed to the Circuit Court;—Congress not having as yet required, as it did by the statute of 3d March, 1863, afterwards passed, that appeals in prize causes to this court should be made directly from the District Court.

In the court below it was argued in behalf of the claimants of the cargo, that the papers fully set out the voyage and intent of the parties; that the captain's conduct, when captured, was frank; no resistance, no attempt to falsify, and no suppression. That to ascertain what the intent was the case was to be tried and the conduct of the parties judged by the state of things in September, 1861; that the proclamation of the President did not say that the ports *were* blockaded, but that they *would* be; that this was all in the *beginning* of the rebellion; that it was then again and again declared that, within a short time, at farthest, the blockade would cease. Port Royal, as the event proved, had come to be in our possession at the time. It might as well, nearly, have been Savannah; but, as it was, events showed that—giving "days of grace" proportioned to the matter—allowing the margin proper—not holding parties too much *au pied de la lettre*—there was perhaps no such misconception, after all, by those who predicted, as eminent persons in our country notoriously did, that the rebellion would be an affair of sixty days, and that the Southern ports would soon be open. Neither was the English idea that the blockade would

be ended, wrong as to result—though it was greatly so as to the cause by which the end would come. However, that was unimportant; the question being only as to the purity of intent, and the matter resting, therefore, on the *fact* of actual belief; a belief which certainly existed in England when the Admiral sailed; and at New Brunswick. Undoubtedly—it was said—in these questions *intent* is the matter to be inquired of. In *Medeiros* v. *Hill*, in the English Common Bench,* and where Sir Nicholas Tindal gave the judgment, the whole reasoning goes on the idea that where no actual entry or exit is shown, the intent is the matter to be inquired into; and, that while in the absence of express proof, any bad intent may be presumed, yet that where the true intent *is* shown none other than it can be inferred. And the stringency of a contrary rule was relaxed by Lord Stowell himself in some cases; as *The Betsey*.† Speaking of Americans during a blockade of European ports, he there said: "I cannot think it unfair to say, that lying at such a distance, where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that *they* should send their ships *conjecturally*." He expressed like views in *The Adelaide*.‡ It was said finally that here the enterprise, whatever it was, was for the benefit of the cargo; that, in fact, the whole undertaking was a charter of the ship to dispose of this cargo and get another for the same owner, and that no case could be cited in which where *the cargo—the whole object and intent of the voyage—was found to be honest, the ship* (the mere carrier) *was held*. In this case both ship and crew were but the merest servants of the cargo; all of it belonging to one adventure and having but only one ultimate object.

The Circuit Court affirmed the decree of the district judge; the following being the opinion given by the presiding justice on the former bench:

Grier, J.: I agree with Chief Justice Tindal, in *Medeiros* v *Hill*, "that the mere act of sailing to a port which is blockaded

* 8 Bingham, 281. † 1 Robinson, 334.

‡ 3 Id. 283; see also The Little William, 1 Acton, 141, per Sir W. Grant.

at the time the voyage is commenced is not an offence against the law of nations, where there is no premeditated intention of breaking the blockade." Consequently, if, in the present case, the Admiral had taken out a clearance for Savannah, with the expectation that the blockade might be removed before her arrival, with instructions to make inquiry as to its continuance at *New York*, or *Halifax*, or other neutral port, and after having made such inquiry, had made no further endeavor to approach or enter the blockaded port, her seizure and condemnation as prize could not have been justified; but she presents a very different case. She was off Tybee Island, sailing for the blockaded port. She had made no inquiry on the way; had no reason to believe the blockade to be raised; and when arrested in her attempt to enter, she exhibits a clearance for St. John's, New Brunswick, a port she may be said to have passed, and a letter of instructions from the owners "to call off the harbor of Savannah, to endeavor to meet the blockading ship, and get the officer in command to indorse the register," &c., but to make no attempt to run the blockade.

The clearance is the proper document to exhibit and disclose the intention of a ship. The clearance, in this case, may not properly come within the category of "simulated papers;" but it does not disclose the whole truth. The suppression of a most important part makes the whole false. It may be true, that in times of general peace, a clearance, exhibiting the ultimate destination of a vessel, without disclosing an alternative one, may have sometimes been used by merchants to subserve some private purpose. But in times of war, when such omissions may be used to blindfold belligerents as to the true nature of a ship's intended voyage, and to elude a blockade, the concealment of the truth must be considered as *primâ facie* evidence of a fraudulent intention. The Admiral, with a full knowledge that her destined port is blockaded, takes a clearance for St. John's, and is found a thousand miles from the proper course to such port, in the act of entering a blockaded port; and when thus arrested, for the first time, inquires whether the blockade has been raised.

A vessel which has full knowledge of the existence of a blockade, before she enters on her voyage, has no right to claim a warning or indorsement when taken in the act of attempting to enter. It would be an absurd construction of the President's proclamation to require a notice to be given to those who al-

ready had knowledge. A notification is for those only who have sailed without a knowledge of the blockade, and get their first information of it from the blockading vessels. Now, the primary destination of this vessel was to a blockaded port. If the owners had reason to expect that possibly the blockade might be raised before the arrival of their vessel, and thus a profit be made by their ability to take the first advantage of it, their clearance, in the exercise of good faith, should have made admission of the true primary destination of the vessel. If the truth had appeared on the face of this document, and if the master had been instructed to inquire at some intermediate port and to proceed no further in case he found the blockade still to exist, the owners might justly claim that their conduct showed no premeditated intention of breaking the blockade. But when arrested in the attempt to enter a port known to be blockaded, with a false clearance, it is too late to produce the bill of lading or letter of instructions to prove innocency of intention. In such cases intention can be judged only by acts. The true construction of this proceeding may be thus translated: "Enter the blockaded port, if you can, without danger; if you are arrested by a blockading vessel, inform the captor that you were not instructed to run the blockade, but had merely called for information, and would be pleased to have your register indorsed, with leave to proceed elsewhere." If so transparent a contrivance could be received as evidence of a want of a premeditated intention to break the blockade, the important right of blockade would be but a *brutum fulmen* in the hands of a belligerent. "It would," says Lord Stowell, in some case, "amount, in practice, to a universal license to attempt to enter, and being prevented, to claim the liberty of going elsewhere." In the cases where the stringency of the general rule, established by this judge (but overruled in *Medeiros* v. *Hill*) had been by him relaxed as to American vessels in certain circumstances, the clearances were taken contingently, but directly for the blockaded port, in the expectation of a relaxation of the blockade, with instructions to inquire as to the fact at a British or neutral port. The clearance exhibits the whole truth, and the place of inquiry, their good faith. In these most material facts, this case differs from them.

I concur in the decree of the District Court.

AFFIRMED.

On appeal from this decree of the Circuit Court the matter—including apparently some query as to the right of appeal from the Circuit Court under the act of March 3, 1863,—came for review here. It was argued fully by *Mr. Donahue for the appellants*, and by *Mr. Assistant Attorney-General Ashton* (who had argued it also in the courts below), *for the United States.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Capture of the ship, together with the cargo, was made on the eleventh day of December, 1861, as lawful prize of war, and both were regularly prosecuted as such in the District Court. Claim for the ship was presented by the master on behalf of Fernie Brothers & Co., of Liverpool, in which he alleged that they were British subjects, and the true, lawful, and sole owners and proprietors of the vessel, her tackle, apparel, and furniture. Record also shows that the master filed at the same time a claim for the cargo on behalf of W. & R. Wright, of St. John's, in the province of New Brunswick, in which he alleged that they were the true, lawful, and sole owners and proprietors of the same, and that they also were British subjects. Accompanying the claims for the ship and cargo is the test affidavit of the master, which was filed at the same time, and which contains substantially the same allegations. Preparatory proofs were duly taken, and the parties were fully heard.

District Court entered a decree condemning the vessel as lawful prize, but acquitted the cargo, and ordered that the same be restored to the owners. Claimants of the vessel appealed to the Circuit Court of the United States for that district where the decree of the District Court condemning the vessel was affirmed, and thereupon the claimants appealed to this court.

1. Appeal to the Circuit Court was allowed before the passage of the act of the third of March, 1863, which requires that appeals from the District Courts in prize causes

shall be made directly to the Supreme Court.* Prior to the passage of that act the Supreme Court had no appellate jurisdiction in prize causes, except when the same were removed here from the Circuit Courts. Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction was by the ninth section of the Judiciary Act conferred upon the District Courts, and it was conclusively determined, at a very early period in our history, that prize jurisdiction was involved in the general delegation of admiralty and maritime powers as expressed in the language of that section.† First decision to that effect was that of *Jennings* v. *Carson*,‡ but the question was shortly afterwards authoritatively settled by the Supreme Court in the same way.§

Admiralty and maritime causes, where the matter in dispute, exclusive of costs, exceeded the sum or value of three hundred dollars, might under the Judiciary Act be removed by appeal from the District Courts to the Circuit Courts, but such causes could only be transferred from the Circuit Courts to the Supreme Court by writ of error.‖

Provision, however, for appeals from the Circuit Courts to the Supreme Court was afterwards made in cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars.

Same act also reduced the minimum sum or value required for appeals from the District Courts to the Circuit Courts to the sum or value of fifty dollars exclusive of costs, and made it the duty of the Circuit Courts to hear and determine all such appeals.¶ Present case was appealed from the District Court to the Circuit while the last-mentioned provision was as applicable to prize causes as it still is to all the other matters of jurisdiction therein specified, and con-

* 12 Stat. at Large, 760.

† 1 Id. 77.

‡ 1 Peters's Admiralty, 7.

§ Glass v. The Sloop Betsey, 3 Dallas, 16; 1 Kent's Commentaries, 339; 2 Stat. at Large, 761.

‖ 1 Stat. at Large, 83, 84.

¶ 2 Id. 244.

sequently the case under consideration is properly before the court.

2. Coming to the merits of the controversy, it is proper to refer to the evidence exhibited in the record, and to deduce from it as far as possible the real character of the adventure, which is the subject of investigation. Owners of the ship were Fernie Brothers & Co., of Liverpool, and the charterers were W. & R. Wright, of St. John's, New Brunswick. Charter-party was dated at Liverpool on the ninth day of September, 1861, and the principal stipulation as to the voyage was that the ship should proceed off the port of Savannah, and if the blockade was raised, then to proceed into port and deliver the cargo as per bill of lading; but if the blockade was not raised, then the ship was to proceed to St. John's, New Brunswick, and there to deliver the same with the usual despatch of the port. Stipulated freight was thirty shillings per ton if the cargo should be landed at Savannah, and fifteen shillings per ton if landed at St. John's, for which latter port the vessel was cleared, as represented in the clearance certificate. Charterers furnished the cargo, but the owners were to have an absolute lien on the same for all freight, dead freight, primage, and demurrage. Vessel sailed for the port of Savannah, and there is not a fact or circumstance in the case tending to show that her primary destination was such, or was ever intended to be such, as is described in the clearance. On the contrary, the owners, in their letter of instructions to the master, admit that the charterers, being anxious to procure a particular cargo from Savannah, made it a condition in taking the ship that she should proceed off that port, so that if the port was open they might secure the very first shipment. When the ship sailed the mate supposed that she was bound for St. John's, but he soon found, as he states, that she was going too far to the southward for such a voyage, and he at once began to suspect that the master intended to go into a southern port. Master's instructions evidently contemplated that the ship might speak other vessels as she approached the coast of the United States, and that the master would be enabled through those

means to ascertain the exact state of affairs, but the master was not directed in any event to abandon the voyage and return.

Substance of the directions in that event was that he was to be guided by any information he might thus obtain, so as not to infringe the blockade regulations, but the clear inference from the document is that the ship was nevertheless to proceed off the blockaded port, and then if met by a blockading vessel to get the officer in command to indorse on the register that the ship had been warned off. Specific directions to the master are that he is to run no risk with the ship, but he is to proceed on the voyage and rather endeavor to satisfy himself as to the blockade, and then find the blockading vessel and get his register indorsed. Cautious as these instructions are, still there is enough in them to show the criminal motives of their authors, especially when it is considered that the ship, under the eye of the owners, sailed from the port of departure under a clearance expressing a false destination. Shippers doubtless expected considerable profits from the sale of the outward cargo, but their controlling motives in chartering the ship were the anticipated profits of the return voyage from the blockaded port. Shipowners were also deeply interested in the success of the adventure, as they were to receive double the amount for freight if the outward cargo was landed at the port of primary destination. Full proof of these facts is exhibited in the record, and it is shown beyond the possibility of doubt that the master, the charterers, and the owners had full knowledge of the existence of the blockade at the inception of the voyage, and there can be no doubt that it was the knowledge of that fact which induced the parties to commence the voyage under a clearance which misrepresented the primary destination of the vessel.

8. Settled rule as established by a majority of this court is that a vessel which has a full knowledge of the existence of a blockade is liable to capture if she attempts to enter the blockaded port in violation of the blockade regulations, and that it is no defence against an arrest made under such cir-

cumstances that the vessel arrested had not been previously warned of the blockade, nor that such previous warning had not been indorsed on her register.*

4. Unlike what is usual in cases of this description it is conceded in this case that the primary destination of the vessel was to the blockaded port; but it is insisted that the mere act of sailing to a port which is blockaded at the time the voyage is commenced is not an offence against the law of nations where there is no premeditated intention of breaking the blockade. Take the proposition as stated, and it is undoubtedly correct, but it is equally well established that it is illegal for a ship having knowledge of the existence of a blockade to attempt to enter a blockaded port in violation of the blockade, and this court decided at the last term that after notification of a blockade the act of sailing for a blockaded port with the intention of violating the blockade is in itself illegal.†

5. But it is unnecessary even to consider any extreme rule in this case, as every pretence of innocence is negatived by the circumstances. Fraud is stamped upon the adventure from the commencement of the voyage to the moment of capture. Such a misrepresentation as that expressed in the clearance might be used to advantage by the master, if his vessel was met by a cruiser in mid ocean as a means to allay suspicion, and it was doubtless intended for some such purpose. While sailing for the blockaded port such a document might be very effectual to enable the master before he had passed the port of pretended destination to deceive belligerents and elude the vigilance of their cruisers. Successful use of that means of deception, however, could not be made at the time of the capture, because the vessel was then off Tybee Island, more than a thousand miles from the proper course to the port specified in the clearance. Seeing that such a pretence would not be likely to avail, the master did

* The Barque Hiawatha, 2 Black, 677.

† The Circassian, 2 Wallace, 135; Medeiros v. Hill, 8 Bingham, 234; The Neptune, 2 Robinson, 110; The Panaghia Rhomba, 12 Moore, Privy Council, 168.

not present the certificate of clearance, but resorted to the terms of the charter-party and the letter of instructions, and insisted that those showed that the vessel did not intend to violate the blockade regulations. Arrested, as the ship was, when near the blockaded port, and when heading for the land, and when in point of fact she was in the act of entering the port, the master then, instead of presenting the clearance for the port which he had passed, set up the pretence that his purpose was to inquire whether the blockade had been raised, and claimed that he must be first notified of a fact, which he knew when the ship sailed, before the capture could lawfully be made. Such a defence is without merit, and finds no support in any decided case, or in any acknowledged principle applicable to prize adjudications.

Inculpatory force of the evidence is much increased by the fact that the inception of the voyage is marked by a full knowledge of the existence of the blockade; and that the vessel, instead of touching at the port for which she was properly cleared, where inquiry might have been made, proceeded directly for the prohibited destination. Conduct of the master also, in withholding from the mate all knowledge of the real destination of the vessel, shows that the clearance certificate was evidently obtained in the form referred to as the means, if it became necessary to use it for that purpose, of deceiving belligerents and of eluding the vigilance of national cruisers. None of these circumstances can be successfully controverted; and the claimants admit that the course of the vessel was directly for the blockaded port, and that she was heading for the land at the moment of capture. Every pretence that the vessel intended to desist from her unlawful purpose, if she found that the port was blockaded, is negatived by the circumstances. Those in charge of her knew before she sailed that the port was blockaded, and they also knew that they had no reason to suppose that it was to be raised before her arrival, consequently they made no inquiry and did not wish to make any until it became necessary to do so as a defence or excuse for an illegal act.

DECREE AFFIRMED.

THE REFORM.

1. The act of July 13, 1861, "to provide *for the collection of duties on imports*, and for other purposes," and which by one section, on a proclamation by the President, makes intercourse between citizens of those parts of the United States in insurrection against its government, with citizens of the rest of the United States unlawful, "so long as such condition of hostilities should continue," was not a temporary act, though passed during the late rebellion; nor on the cessation of hostilities did forfeitures, which had been incurred, after proclamation, under that section, cease to be capable of enforcement.
2. The act of 13th February, 1862, by which a sum of money was appropriated "for the purchase of cotton-seed, under the superintendence of the Secretary of the Interior, for general distribution, provided that the said cotton shall be purchased from places where cotton is grown as far north as practicable," did not give power to the Secretary of the Interior to authorize an agent to transport merchandise to any district where the seed was to be got; such district having been then declared by proclamation, authorized by Congress, to be in a state of insurrection against the authority of the United States, and all intercourse with it prohibited, except where the President in *his* discretion might allow it in pursuance of rules prescribed by the Secretary of the *Treasury*.
3. Nor was a letter from the Secretary of the Interior to a person, which by its terms did no more than authorize and appoint him to "procure" a cargo of such seed "*in*" a prohibited or partially prohibited district (Virginia), and to "bring *it to*" a place not prohibited (Baltimore), even in its terms, such a license.

ON the 13th July, 1861, Congress passed "An act further to provide for the collection of duties on imports, and for other purposes." The late rebellion was in its rise at this time, but the act did not refer to it, nor was its operation declared, in any part of it, to be temporary.

By the 5th section it was enacted that "*whenever*" the militia called forth by the President had failed to disperse insurgents in any State against the national authority, it should be lawful for the President, by proclamation, to declare that the inhabitants of such State, or part of a State, were in "a state of insurrection against the United States;" and thereupon the statute proceeded,

"All commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United

States, shall cease and be unlawful *so long as such condition of hostility shall continue;* and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be *forfeited to the United States.*"*

The act contained, however, this proviso:

"That *the President* may in his discretion license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such a time, and by such persons as *he*, in *his discretion*, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on *only* in pursuance of *rules and regulations* prescribed by the *Secretary of the Treasury.*"

Soon after the passage of this act, to wit, on the 16th of August, 1861, President Lincoln made such proclamation as the act itself authorized;† declaring that the inhabitants of several States, which he named, including Virginia—"except the inhabitants of that part of it lying west of the Alleghany Mountains, and of such other parts of that State, and the other States hereinbefore named, as may maintain a lawful adhesion to the Union and the Constitution; or *may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of such insurgents,*"

"Are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the United States, is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed; *that all goods and chattels, wares and merchandise, coming from* any of said States, *with the exceptions aforesaid*, into other parts of the United States, without the special license and permission of the President, *through the Secretary of the Treasury*, or *proceeding to* any of said States, with the excep-

* 12 Stat. at Large, 257. † 12 Id. 1262.

tions aforesaid, by land or water, *together with the vessel* or vehicle conveying the same, or conveying persons to or from said States, with said exceptions, will be *forfeited to the United States.*"

From an early date of the insurrection certain persons in the loyal States were desirous, it seemed, to get cotton-seed from the South. And some of the executive departments—to which these persons addressed themselves—with a view of seeing how far northward this national staple could be profitably cultivated, had listened, it appeared, on particular occasions, with favor to the idea. The Treasury was apparently deterred, however, from giving much co-operation to any project of the sort, from its unwillingness to grant either passes or requests for passes, the effect of which might be to violate the blockade by which the government was then vigorously affecting the rebellious ports; and in January, 1862, an authority, not long previously granted by the then Secretary of the Treasury, upon the recommendation of high military persons, to one Smith, was on this account by him revoked.

Congress, however, a short time afterwards, to wit, on the 13th of February, 1862, passed—

"*An act making an appropriation for the purchase of cotton-seed for general distribution.*

"Be it enacted, &c., That there be, and is hereby, appropriated, out of any money in the treasury not otherwise appropriated, the sum of $3000 for the purchase of cotton-seed, and $1000 for the purchase of tobacco-seed, under the superintendence of the Secretary of *the Interior*, for general distribution; provided that the said cotton-seed shall be purchased from places where cotton is grown as far north as practicable."

Among the persons who wished to enter into this business of getting cotton-seed was Mr. William L. Hodge, of Washington City. On the 7th of March, 1862—*after* the passage of the above-quoted act of Congress,—he obtained from the Secretary of the Treasury a license "to employ a vessel to carry cotton-seed from any point on the waters of Virginia emptying into the Chesapeake Bay to the port of Baltimore;

provided that he, the said William, shall first execute a bond, with one or more sureties, to be approved by the Solicitor of the Treasury, in the penal sum of $20,000 conditioned that the vessel so employed shall *not transport to or from Baltimore or Virginia, any goods, wares, or merchandise, or supplies other than those actually required for the use of the crew thereof for one trip;*" and with a further proviso, among some others, "that one-half of the cotton-seed so obtained shall be furnished to the Secretary of the Interior at the cost thereof."

Of this license for some reason Mr. Hodge never availed himself. He gave no bond and the document remained a dead letter. He did, however, procure on the *next* day after the date of this license a letter, in these words, from the Secretary of the *Interior:*

DEPARTMENT OF THE INTERIOR,
March 8, 1862.

SIR: Congress having authorized this department to procure* cotton-seed for planting in the loyal States, I hereby authorize and appoint you to *procure a cargo of the same in Virginia, and bring it to Baltimore,* &c.

This letter will be your authority *to procure said seed,* and all parties in employ of the United States are respectfully requested to allow you to pass freely for said purpose.

I am, &c.,
C. B. SMITH,
Secretary.

W. L. HODGE, Esq.,
Washington City, D. C.

The Secretary of the Navy some time afterwards thus indorsed this letter:

NAVY DEPARTMENT,
April 25, 1862.

Naval officers in command of ships of war will respect the inclosed, and will afford protection in waters under their control and jurisdiction inside the capes of Chesapeake Bay.

G. WELLS.

* The word in the statute, as the reader will have noted, is to "purchase" cotton-seed.

Statement of the case.

In possession of the letter of the Secretary of the Interior, thus indorsed, Mr. Hodge entered into a contract with one Penniman, who it seemed had been associated in the former enterprise of Smith, to supply the Secretary with "cotton-seed under the recent act of Congress." In pursuance of this agreement Penniman loaded first a vessel called the Hunter, with which he went into prohibited districts, but brought back no cotton-seed, though he got some tobacco. He then loaded "The Reform," a schooner of fifty-seven tons, at Baltimore, with a cargo of a miscellaneous kind, well suited to a blockaded region,—several considerable items of which it was alleged were not on the manifest; though this document was sworn to as true. With this cargo the Reform *cleared* for Alexandria, a lawful port; and then *set sail* for Urbanna, in the eastern district of Virginia; a district then in insurrection against the United States, and so proclaimed by the President to be.* Before the vessel had got far she was seized by the revenue officers, brought back and libelled for forfeiture in the District Court for Maryland.

The libel set forth the act of 1861, the President's proclamation under it, and that this vessel was in the act of going to a prohibited district.

The answer which was put in by the claimant of the vessel, one Bailey, and by Penniman, owner of the cargo, admitted in the main these allegations; defending by matter in avoidance chiefly. It gave very interestingly a narrative of the project to get cotton-seed in the welfare of the country by different persons; of Smith and Penniman's failure; alleging various confidential interviews with officers of the government, military, naval, and civil; that *secrecy* was understood by all to be a matter indispensable to success; and also a diversion of public attention from what was really doing; and this—along with the fact that the respondents were informed at the Treasury when Smith's license was re-

* It did not appear that Mr. Hodge knew of the inconsistency of the manifest with the complete items of the cargo, or, indeed, of the clearance which had been made at the custom-house.

voked, that it was revoked because too much publicity had been given to his intention, and for no other reason—was assigned as the cause for the clearance to one port while the real destination was to another; a matter which it was said the military commander of the region, General Dix, was perfectly apprised of, though of course others generally were not; that at the time of the passage of the act of 1862, no part whatever of the cotton-growing country was occupied by forces of the United States; that the act, by its express terms, contemplated a purchase from places as far north as the staple grew; and that the point to which the voyage was directed, Urbanna, did answer and was the only place that did satisfy the requisitions by the act prescribed. A cargo was taken aboard, it was said, because the only currency at this time common to the northern and southern portions of the United States was gold, and because—there having been a universal suspension of specie payments with an establishment of paper as a legal tender for almost everything—gold was an article of commerce as much as anything else, and specially dangerous from its now sudden mutations in market value to deal in at all; that it was necessary to take *something* which could be advantageously exchanged for cotton-seed; that the respondent, Penniman, selected such articles as he supposed would best effect the object of obtaining such seed. And the answer submitted that if the sending of such a mission into Virginia by the Secretary of the Interior under the authority of Congress was a lawful act, the enterprise had not become unlawful, and the goods intended to be used therein forfeited, because of a difference of opinion as to the details of the execution of such mission between the officers of the customs and the messenger of the government. The most that could be done was to reform such mission according to what might be determined to be its true object and scope, and not to impose a forfeiture for a mistake in construction of an act of Congress; especially in a matter where secrecy was of the essence and where the want of means to have full and clear understandings was so conspicuous.

The District Court dismissed the libel; and its decree was confirmed on appeal to the Circuit Court. The case was now here for review on appeal by the United States.

Between the time when the proceeding in the District Court was begun, and that when the case came here to be heard on appeal, the insurrection, in vigor when the libel was filed, had been in effect suppressed. The rebel armies had everywhere surrendered. The civil head of it was a prisoner of the United States, in one of its fortresses; and the whole insurrectionary combination was scattered and destroyed. Military forces were, however, still kept in parts of the rebellious region. The ancient order of things was not in all matters renewed. From the States lately in rebellion members were not yet received in Congress.

Before any argument on the merits, *Messrs. Thayer and Dobbin, for the appellees, claimants of the vessel and cargo*, moved to *dismiss the writ* on account of this termination of the insurrection. The act of Congress of 1861, so far as this matter was concerned, or more properly the proclamation under it, they argued, was of a temporary character. It was not a general provision without limitation as to its duration. Its very terms limited the duration of the restrictions on commerce to the term during which the "condition of hostility should continue." The rebellion was terminated. Of its termination the court would of course take judicial notice. The case then fell within *Yeaton* v. *United States* in this court,* and numerous other cases, establishing that a forfeiture incurred under a provision temporary in its character cannot be enforced after the expiration of the same.† In *Yeaton* v. *United States*, a schooner had been condemned below for a breach of an act of Congress prohibiting commerce with St. Domingo. The act was originally limited in duration to one year, and was afterwards continued until the end of the next session, when it expired. The case was pend-

* 5 Cranch, 281.

† Miller's case, 1 W. Blackstone, 451; and other authorities in support of it cited in Steamship Company v. Joliffe, 2 Wallace, 464–5.

ing in this court on appeal. The court, MARSHALL, C. J., held (i), that the case being here on appeal, was as a new case; and (ii), that the statute having expired, no penalty could be enforced for its violation.

On the merits, they reiterated, amplified, and enforced the grounds taken by the answer. Assuredly the act of 1862 authorized a purchase of cotton-seed. Such seed could be then had from no other place than a district in insurrection. If this was so—and the fact was not denied—the act of 1862 did, to some extent, qualify the act of 1861; not generally, not in all things, but *pro tanto*, and as to one narrow and particular thing; not generally even as to that, since the purchasing of the cotton-seed was put under the control of the Secretary of the Interior alone. The claimants require, for the purposes of their argument, no "repeal" larger than this; a very partial, limited, and special one; a qualification rather than a repeal.

If the Secretary had power to give a license to get cotton, his license authorized the use of convenient, and of the most convenient, means to get it.* The whole matter was under his "superintendence,"—a large word. He could buy it and give gold. He could buy it and give merchandise. Gold was now merchandise, and merchandise only. It was not currency at all. What difference did it make—he having authority to buy, and of course to pay for—whether he paid in one sort of merchandise or in another?

Then what will be said of the authority by the Secretary of the Navy? Here is the head of the department giving an authority to pass!

The act of Congress, in short, conferred upon the Secretary of the Interior the performing a judicial act, and he having performed that act (whether this court may think he interpreted the act of Congress rightly or not), and other departments, like the Navy, having agreed with him in view, the citizen who reposed in the interpretation, and put his property at risk in accordance with it, is not liable to

* See The Cornelia, Edwards, 360; The Freundschaft, 1 Dodson, 316.

have it confiscated, especially in a case where no wrong was consummated, and where the same act performed now would be both lawful and meritorious.

Mr. Speed, A. G., and Mr. Assistant Attorney-General Ashton, contra.

As to the motion to dismiss.

The act was not a temporary act in its terms, or in any true sense temporary at all. It remains in force for any future rebellion, if there should be one; and though this particular section may become practically useless at present, *if* the rebellion is fully suppressed, it does not cease to be effective so far as it has, by proclamation made under it, already operated. In *Yeaton* v. *United States*, the act was in its nature and by its terms temporary.

As to merits.

1. The act of 1861 gave no one but the President, through the Secretary, who was to establish "rules and regulations," power to license the trade. Hodge was aware of this, and applied to and obtained from the Treasury a license. *That* license he did not use. It did not suit him. It had conditions inconvenient for him to comply with, and which would have defeated his ends. He, therefore, on the next day after he saw that it was impracticable, and *not before*, applied for the license under which the vessel was freighted.

Now the act of 1862 gave the Secretary of the Interior no authority to purchase cotton-seed in *insurrectionary districts;* districts, that is to say, with which the President had prohibited all intercourse. It extended no further than to the purchase, and to remove it from regions in some way "excepted" by the proclamation. It said, simply, "take $3000 from the treasury, and with that money buy cotton-seed in the northernmost section of the cotton-growing country." It assumed that such purchase might be made lawfully; that is to say, without any intercourse with rebels. It was lawful to trade with persons in those districts "excepted" by the President in his proclamation. Parts were then loyal, and parts occupied. Our armies were successful from

the time that they became well organized. They were daily recovering the country. Intercourse with the portions permanently and completely under control, were within the President's exceptions. We so held in *The Venice.** Thus interpreted, the act of 1862 is quite consistent with the act and the proclamation of 1861. All remain in force. Authority to purchase the seed in the *prohibited* districts cannot be asserted, if it was possible to buy it elsewhere. If it was not possible to do this, then the case was simply that of an appropriation which it was not practicable to use, unless you suppose that the act of 1862 repealed the act of 1861. This cannot be argued. In express terms it does not repeal it. It does so as little by implication; a kind of repeal in no case favored, and in such a matter as this—purchasing from rebels—to be greatly disfavored; not to be *presumed* at all. But even stronger grounds remain; and we say:

2. If the act of 1862 did *pro tanto* repeal the act of 1861, and if the Secretary of the Interior had authority to direct a purchase of $3000 worth of cotton-seed from rebels, he yet had no authority to license the transportation of merchandise to districts declared to be in insurrection; obtaining, finally, from them with the proceeds—supposing which is a benignant supposition, that the merchandise was simply to be exchanged—a cargo of cotton-seed. That is a vastly different authority from the other. Every consideration of policy forbids such a broad construction of the act. So do the authorities;† and if the Secretary did by his letter of March 8th, 1862, mean to authorize Hodge to freight a vessel and carry a cargo to the rebels, and *thus* deal with them for cotton-seed, he meant to do what the act of 1862 never authorized. But,

3. He meant no such thing. He meant simply to authorize Mr. Hodge to purchase or buy the seed in Virginia; to go there in ballast, if he had to go with a vessel, and by water; but not to take a cargo of assorted merchandise to an insurrectionary district and there sell it, in order to raise

* 2 Wallace, 277. † The Hoffnung, 2 Robinson, 167.

money. Hodge could enter into no such enterprise as that, and not violate, at every step, the President's proclamation. If Hodge had not the money already, then he was not in a condition to make the purchase. That was his affair. A license to trade with an enemy is, of course, to be construed most strictly. The party may trade *only* to the extent of the license.* Under the license it was lawful, if the party had the money, to purchase. It was not lawful, if he had not money, to do unlawful things to get it. The authority, as the other side construes it, would have given Hodge a power to trade almost indefinitely with the enemy, or to have done any other prohibited act, till he had raised money necessary to buy the cargo of seed. The Secretary's letter says not one word of taking a cargo from Baltimore *to* Virginia. It says only you may procure one "*in* Virginia and bring it to Baltimore."

On these two grounds alone the matter may safely rest. The indorsement of the letter by the Secretary of the Navy did not, of course, mean to confer a privilege not conferred by the Secretary of the Interior. We need not discuss that. It protected the licensee only in the execution of such authority as the Interior conferred. Certainly it had no power to relax the blockade in Hodge's behalf, or to license an intercourse prohibited by Congress and the President.

4. Independently of all this we may add what is certain, that no license to Hodge to trade with the enemy could authorize other persons to do so. The license here, if it was a license, was not a general but a special one; and special licenses are never transferable.† Hodge, for aught that appears, was a proper person. It is plain that his transferees were not.

5. The license, whatever it was, was exhausted by the Hunter's voyage. With that completed, it became *functus officio*. But irrespective of the law of the case,

6. The enterprise of Penniman & Baily was an attempt

* The Jonge Klassina, 5 Robinson, 265; The Juno, 2 Id. 118; The Cosmopolite, 4 Id. 12; The Jonge Arend, 5 Id. 19.

† The Jonge Johannes, 4 Robinson, 268; The Aurora, Id. 220.

at illicit trade. The whole facts point to this conclusion; and the wonder is, how two courts have agreed in viewing it otherwise.

Mr. Justice CLIFFORD delivered the opinion of the court.

Cause of seizure, as alleged in the libel of information, was that the vessel with her cargo was, on the seventh day of May, 1862, proceeding from the port of Baltimore, on a voyage to that part of the State of Virginia which was in insurrection against the United States, and which had been so proclaimed to be by the President of the United States. Allegations of the libel, so far as the charge is concerned, are founded upon the provisions of the 5th section of the act of the thirteenth of July, 1861, which, under certain conditions, conferred authority upon the President to declare, by proclamation, that the inhabitants of a State, or part of a State, falling within the category therein described, were in a state of insurrection against the United States. Whenever a State or part of a State was so proclaimed to be in a state of insurrection, the provision was, that thereupon all commercial intercourse by and between the same and the citizens thereof, and the rest of the United States, should cease and be unlawful, so long as such condition of hostility should continue. Purpose of the section was, in case of such insurrection, not only to interdict commercial intercourse, but to enforce the prohibition by forfeiture. Provision was accordingly made, that all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, should, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States. Defence of the vessel and cargo is placed upon the same ground, and, therefore, it will not be necessary to give the respective claims a separate examination.

Decree of the District Court discharged the vessel and cargo, and dismissed the libel; and the Circuit Court, on

appeal, affirmed the decree. Libellants appealed to this court; and they now insist that the decree of the Circuit Court should be reversed, because, as they contend, the vessel and cargo are both justly forfeited, as alleged in the libel of information.

1. Before considering the merits of the controversy, however, it becomes necessary to examine the motion filed by the respondents to dismiss the appeal, which presents a preliminary question, and consequently should be first decided. Theory of the respondents is, that commercial intercourse with the States lately in insurrection is no longer unlawful; and inasmuch as there is no reservation in any act of Congress, nor in any proclamation of the President, whereby a liability for former violations of the law is continued and preserved, no condemnation of the vessel or cargo can now take place, and that the appeal ought to be dismissed. They contend that the act of Congress was a temporary act; because the restrictions upon commercial intercourse, as therein declared, were limited in duration, by the terms of the act, to the existence and continuance of actual hostilities; and the argument is, that hostilities having ceased, the act has expired, and, consequently, that the appeal cannot be sustained.

Respondents are correct in supposing that a forfeiture incurred under a penal statute, temporary in its terms, cannot be enforced after the statute has expired, and that the repeal of a penal statute has the same effect, unless the repealing law contains a saving clause as to pending prosecutions. Many authorities were cited in support of these propositions; but it does not seem to be necessary to give them much examination, as the propositions are elementary and undeniable. Granting all this, however, still it is quite evident that the motion cannot prevail, because the act of Congress under consideration was not a temporary act, as assumed by the respondents, nor has it ever been repealed. On the contrary, it is a general law without any limitation as to its duration, and is still in full force for the recovery of penalties, or for the enforcement of forfeitures incurred dur-

ing the insurrection, and before the termination of hostilities. Restrictions upon commercial intercourse were limited to the period of the continuance of hostilities, but there was no limitation as to the duration of the act of Congress. Cessation of hostilities restored the right of commercial intercourse; but the restoration of such intercourse could not have the effect to repeal the act of Congress which suspended such intercourse during the continuance of hostilities, or to exonerate a vessel or cargo from a forfeiture incurred for a violation of the restrictions while they were in full operation. Motion to dismiss the appeal is, therefore, overruled.

2. Principal defence upon the merits was, that the vessel, with the cargo, was engaged, at the time of the seizure, in a lawful voyage under a license from the Secretary of the Interior, issued by the express authority of the government. Claimants admit that the vessel, with the cargo, was proceeding, at the time of seizure, to the place specified in the libel of information, and that all commercial intercourse, not specially authorized by the government, between the States declared to be in rebellion and the rest of the United States, was prohibited and unlawful. Considering the nature and extent of the admissions as exhibited in the answer, it is clear beyond controversy that the burden of proof is upon the respondents to establish their defence.

Such a defence, unquestionably, may be valid, and, if fully proved, the decree of the Circuit Court must be affirmed. Authority was conferred upon the President, by a proviso of the section under consideration, to license and permit in his discretion commercial intercourse, in the interdicted States or places, in such articles, and for such time, and by such persons, as he might think most conducive to the public interest; but all such intercourse was to be conducted and carried on *only* in pursuance of rules and regulations prescribed by the Secretary of the Treasury.* Congress, also, on the thirteenth day of February, 1862, appropriated the sum

* 12 Stat. at Large, 257.

of three thousand dollars out of any money in the treasury not otherwise appropriated for the purchase of cotton-seed, and one thousand dollars for the purchase of tobacco-seed, under the superintendence of the Secretary of the Interior, for general distribution; but the provision was that the cotton-seed should be purchased from places where cotton was grown, as far north as possible.

3. Referring to those two acts of Congress, the claimants allege that the Secretary of the Interior appointed William L. Hodge to procure the cotton-seed as authorized in the place for which the vessel was embarked, and to which she was proceeding at the time of the seizure. They plead the letter of the Secretary of the Interior in their answer as a license and permit from the government, and as a document affording a full defence to the allegations of the libel. Substance of the letter is as follows: "Congress having authorized this department to procure cotton-seed for planting in the loyal States, I hereby authorize and appoint you to procure a cargo of the same in Virginia, and bring it to Baltimore, this department to have the privilege to take such portion of said cargo as it may require, not exceeding one-half, at the actual cost and charges." Statement of the letter also, was, that it "will be your authority to procure said seed," and contained a request to all parties in the employment of the United States to allow the appointee to pass freely for that purpose. Answer of the claimants also shows that the Secretary of the Navy, on the twenty-fifth day of April following, indorsed the letter of appointment in the terms following, to wit: "Naval officers in command of ships of war will respect the inclosed, and will afford protection in waters under their control and jurisdiction inside the capes of Chesapeake Bay."

4. Sufficiency of the defence is denied by the United States upon various grounds, but in the view taken of the case there is no necessity of examining more than two of the series. 1. They deny that the Secretary of the Interior had any authority under the appropriation act to license or permit the transportation of merchandise from any loyal State

to any section of a State declared and being in insurrection, in order that the same might be there sold for the purpose specified or for any other purpose. 2. Purport of the second proposition is, that the Secretary of the Interior, by his letter of appointment to William L. Hodge, did not authorize and did not intend to authorize him, or any one, to transport merchandise for that or any other purpose, to any State or section of a State with which commercial intercourse was prohibited.

1. Proclamation of the President of the sixteenth of August, 1861, which declared that certain States and parts of States were in insurrection, expressly excepted from that condition those districts, or parts of the same, which might be "from time to time occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents." Intercourse for commercial purposes was not prohibited with such places or districts while so occupied and controlled. They were not regarded, as this court said, in the case of *The Venice*,* "as in actual insurrection, or their inhabitants as subject in most respects to treatment as enemies."

Such intercourse, however, with any such State, place, or district, so occupied and controlled, was absolutely forbidden, unless the person or persons conducting it were furnished with a license and permit of the President, and conformed in all respects to the treasury rules and regulations. Respondents do not pretend that the Secretary of the Interior possessed any power under those provisions to grant any license or permit for any such adventure as that which is the subject of the present controversy, and it is clear that the pretence, if set up, could not for a moment be sustained, as the power is expressly vested in the President, and the requirement was that any commercial intercourse carried on under such a license and permit, should be conducted in conformity to the regulations of the Treasury Department.

Want of power, therefore, in the Secretary of the Interior,

* 2 Wallace, 277.

is clearly shown, unless it be made to appear that those provisions had been modified or repealed before the date of the letter under which the claimants attempt to justify. Express repeal is not set up, and the pretence of implied repeal has no better foundation. Repeal by implication, upon the ground that a subsequent provision upon the same subject is repugnant to the prior law, is not favored in any case; but where such repeal, if admitted, would operate to the prejudice of the government, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect.*

Instead of the last provision being repugnant to the former, the truth is that the two are entirely consistent. Whole effect of the subsequent provision was, that it appropriated the sum of three thousand dollars for the purchase of cotton-seed under the general superintendence of the Secretary of the Interior for general distribution. Purchase of the cotton-seed, it is presumed, might have been made in the districts or places within the insurrectionary States, which were occupied and controlled by our military forces, or at all events, the conclusion is a reasonable one that such were the views of Congress when the appropriation was made. Presumption is that Congress did not intend to relax the existing restrictions upon commercial intercourse with the States or districts declared to be in insurrection, because there is not a word or phrase in the act indicating any such intention. Condition of affairs was well known to Congress at that period, and it is to be presumed that those who voted for the appropriation act and directed the purchase of the cotton-seed, if they had intended to relax the commercial restrictions as a means of facilitating the purchase, would have employed appropriate language to signify that intention Nothing of the kind is expressed in the appropriation act, and consequently there is no repugnancy between that act and the prior provision which established the commer-

* United States v. Walker, 24 Howard, 311; Wood v. United States, 16 Peters, 363.

cial restrictions, and prohibited commercial intercourse to the place where the vessel in question with the cargo was bound at the time of the seizure.

2. Second proposition of the appellants is, that by the true construction of the letter under which the claimants attempt to justify, it did not give to the appointee, or any one else, any authority whatever to transport a cargo of merchandise from Baltimore to the place where the vessel was bound at the time of the seizure. Admission of the answer, it will be remembered, is, that the vessel was bound to the place alleged in the information, and that the place, as there alleged, was one of the places declared by the President to be in a state of insurrection. Question here presented is one of construction, but the court, in determining it, may look at the surrounding circumstances and the subject-matter, as well as at the language employed in the instrument. Legal presumption is, that the author of the letter, inasmuch as he was a public officer, intended to perform his duty, and that he did not intend to violate the law of the land. Three thousand dollars, out of any money in the treasury not otherwise appropriated, were placed at his disposal for the purchase of cotton-seed for general distribution.

Directions in the act making the appropriation were, that he should make the purchase from places where cotton was grown, as far north as possible; but the presumption is, that he had full knowledge of the then existing commercial restrictions, and that the appropriation act, under which all his authority was derived, did not in terms repeal or in any manner modify or relax those restrictions. Satisfactory evidence that the Secretary of the Interior and his appointee had such knowledge, is exhibited in the record. First application for the license was made to the President. Pursuant to that application, the Secretary of the Treasury, on the seventh day of March, 1862, granted a license and permit to the same William L. Hodge, and the recital of the document is, that it was granted with the approbation of the President, and by virtue of the power conferred by the act under which the forfeiture of the vessel and cargo is now

claimed. Power conferred was, that the licensee might employ a vessel to carry cotton-seed from any point on the waters of Virginia, emptying into Chesapeake Bay, to Baltimore, provided he gave bond in the penal sum of twenty thousand dollars, conditioned that the vessel so employed should not transport, either way, any merchandise or supplies, other than those actually required for the use of the crew for one trip; or convey any person, letter, or information, or in any way aid or comfort those in rebellion. Although this license was never used by the licensee, still it is proper to refer to it as showing the views of the government, and as affording conclusive evidence that the licensee knew that the commercial restrictions, established under the prior act, were unrepealed and in full force.

Dissatisfied with the license and permit granted by the Secretary of the Treasury, with the approbation of the President, the licensee proceeded to the Department of the Interior, and there obtained the letter under consideration. Introductory recital of the letter is not quite correct, but in determining what is the true construction of the document, it is proper to weigh the language as it is written. Substantial statement of the author of the letter is, that he is "authorized to procure cotton-seed for planting in the loyal States," and that in consequence thereof, he authorizes and appoints the licensee to procure a cargo of the same in Virginia, and bring it to Baltimore, on the conditions therein named. He says nothing about transporting cargo to the place of destination, or about bringing back any other cargo than the cotton-seed. No allusion is made to the existing commercial restrictions, nor any intimation given that they would be modified or repealed. Applying the usual rules of construction to the letter, the conclusion must be that it conferred no authority whatever upon the licensee to transport any merchandise to the port or place where the vessel was bound at the time of the seizure.

5. Evidence of authority in William L. Hodge to embark in any such adventure being entirely wanting, it is unnecessary to examine the question whether the license, if valid,

and sufficiently comprehensive in its terms to protect the licensee, would afford any justification to the claimants.

6. Grounds of the decision, as already stated, render it unnecessary, also, to examine the question of fraud, or to remark upon the evidence respecting the prior voyage.

Decree of the Circuit Court is therefore reversed, and the cause remanded, with directions to enter a decree of forfeiture against both the vessel and cargo.

DECREE ACCORDINGLY.

YOUNGE v. GUILBEAU.

1. The statute of Texas, relating to the organization, &c., of its District Courts, which enacts that when a party shall file an affidavit of the loss of an instrument recorded under the statute, or of his inability to procure the original, a certified copy of the record shall be admitted in like manner as the original—does not dispense with the proof which is exacted when the original instrument is filed, in case an affidavit (which the statute also allows) alleging a belief of its *forgery*, is made. It only allows the certified copy to take the place of the original when that is lost or cannot be procured: and the copy produced under such circumstances will have no greater weight than the original itself.

   To avail himself, therefore, of the statute, the party must, in all cases, file, as therein prescribed, the original or the copy from the record, and give notice of the filing; and even then the statutory proof will be insufficient, if the affidavit alleging a belief of its forgery be made. Such affidavit being filed, the party relying upon the deed must make proof of its execution, with all its essential formalities, as required by the rule of the common law.

2. To constitute delivery of a deed the grantor must, as a general thing, part with the possession of it, or at least with the right to retain possession. Upon a question of delivery, its registry, if by him, is entitled to great consideration, and might, perhaps, in the absence of opposing evidence, justify a presumption of delivery. But where the grantee had no knowledge of the existence of the deed, and the property which it purported to convey always remained in the possession and under the control of the grantor, and where, therefore, any registry was of course without either his assent or knowledge, the presumption of a de-

livery from the fact of registry is repelled. [N. B. In the case at bar, there was an allegation that the deed registered was a forgery.]

A STATUTE of Texas, relating to the registry of deeds, &c., provides as follows:*

"Every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the county court, and which has been, or may be so recorded after being proven or acknowledged in the manner provided for by the laws in force at the time of its registration, shall be admitted as evidence, without the necessity of proving its execution; provided, the party who wishes to give the same in evidence shall file the same among the papers of the suit in which he proposes to use it, at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party, or his attorney, of record; and *unless such opposite party, or some other person for him, shall, within one day after such notice, file an affidavit that he believes such instrument of writing to be forged.* And whenever any party to a suit shall file among the papers of the suit an affidavit, stating that any instrument of writing recorded as aforesaid, *has been lost*, or that *he cannot procure the original*, a certified copy of the record of any such instrument shall be admitted in like manner as the original could be."

With this statute in force, Mrs. Younge brought trespass against Guilbeau and eleven others in the Federal Court for the Western District of Texas, to try the title to a lot of ground in that district. She proved that the lot belonged originally to one Nixon, her ancestor, now deceased, and that she was his sole heir. Guilbeau and the others, defendants in the case, admitting the original ownership alleged, set up that Nixon had conveyed the lot, by deed, in his lifetime to a certain Shelby; from whom they, Guilbeau and the other defendants, derived title to themselves.

The suit thus involved, in its merits, the existence of a deed from Nixon to Shelby.

* Statute of May 11, 1846, relating to the organization, &c., of the District Courts; Oldham & White's Digest, of Texas Laws, art. 469, pp. 124–5.

at illicit trade. The whole facts point to this conclusion; and the wonder is, how two courts have agreed in viewing it otherwise.

Mr. Justice CLIFFORD delivered the opinion of the court.

Cause of seizure, as alleged in the libel of information, was that the vessel with her cargo was, on the seventh day of May, 1862, proceeding from the port of Baltimore, on a voyage to that part of the State of Virginia which was in insurrection against the United States, and which had been so proclaimed to be by the President of the United States. Allegations of the libel, so far as the charge is concerned, are founded upon the provisions of the 5th section of the act of the thirteenth of July, 1861, which, under certain conditions, conferred authority upon the President to declare, by proclamation, that the inhabitants of a State, or part of a State, falling within the category therein described, were in a state of insurrection against the United States. Whenever a State or part of a State was so proclaimed to be in a state of insurrection, the provision was, that thereupon all commercial intercourse by and between the same and the citizens thereof, and the rest of the United States, should cease and be unlawful, so long as such condition of hostility should continue. Purpose of the section was, in case of such insurrection, not only to interdict commercial intercourse, but to enforce the prohibition by forfeiture. Provision was accordingly made, that all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, should, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States. Defence of the vessel and cargo is placed upon the same ground, and, therefore, it will not be necessary to give the respective claims a separate examination.

Decree of the District Court discharged the vessel and cargo, and dismissed the libel; and the Circuit Court, on

appeal, affirmed the decree. Libellants appealed to this court; and they now insist that the decree of the Circuit Court should be reversed, because, as they contend, the vessel and cargo are both justly forfeited, as alleged in the libel of information.

1. Before considering the merits of the controversy, however, it becomes necessary to examine the motion filed by the respondents to dismiss the appeal, which presents a preliminary question, and consequently should be first decided. Theory of the respondents is, that commercial intercourse with the States lately in insurrection is no longer unlawful; and inasmuch as there is no reservation in any act of Congress, nor in any proclamation of the President, whereby a liability for former violations of the law is continued and preserved, no condemnation of the vessel or cargo can now take place, and that the appeal ought to be dismissed. They contend that the act of Congress was a temporary act; because the restrictions upon commercial intercourse, as therein declared, were limited in duration, by the terms of the act, to the existence and continuance of actual hostilities; and the argument is, that hostilities having ceased, the act has expired, and, consequently, that the appeal cannot be sustained.

Respondents are correct in supposing that a forfeiture incurred under a penal statute, temporary in its terms, cannot be enforced after the statute has expired, and that the repeal of a penal statute has the same effect, unless the repealing law contains a saving clause as to pending prosecutions. Many authorities were cited in support of these propositions; but it does not seem to be necessary to give them much examination, as the propositions are elementary and undeniable. Granting all this, however, still it is quite evident that the motion cannot prevail, because the act of Congress under consideration was not a temporary act, as assumed by the respondents, nor has it ever been repealed. On the contrary, it is a general law without any limitation as to its duration, and is still in full force for the recovery of penalties, or for the enforcement of forfeitures incurred dur-

ing the insurrection, and before the termination of hostilities. Restrictions upon commercial intercourse were limited to the period of the continuance of hostilities, but there was no limitation as to the duration of the act of Congress. Cessation of hostilities restored the right of commercial intercourse; but the restoration of such intercourse could not have the effect to repeal the act of Congress which suspended such intercourse during the continuance of hostilities, or to exonerate a vessel or cargo from a forfeiture incurred for a violation of the restrictions while they were in full operation. Motion to dismiss the appeal is, therefore, overruled.

2. Principal defence upon the merits was, that the vessel, with the cargo, was engaged, at the time of the seizure, in a lawful voyage under a license from the Secretary of the Interior, issued by the express authority of the government. Claimants admit that the vessel, with the cargo, was proceeding, at the time of seizure, to the place specified in the libel of information, and that all commercial intercourse, not specially authorized by the government, between the States declared to be in rebellion and the rest of the United States, was prohibited and unlawful. Considering the nature and extent of the admissions as exhibited in the answer, it is clear beyond controversy that the burden of proof is upon the respondents to establish their defence.

Such a defence, unquestionably, may be valid, and, if fully proved, the decree of the Circuit Court must be affirmed. Authority was conferred upon the President, by a proviso of the section under consideration, to license and permit in his discretion commercial intercourse, in the interdicted States or places, in such articles, and for such time, and by such persons, as he might think most conducive to the public interest; but all such intercourse was to be conducted and carried on *only* in pursuance of rules and regulations prescribed by the Secretary of the Treasury.* Congress, also, on the thirteenth day of February, 1862, appropriated the sum

* 12 Stat. at Large, 257.

of three thousand dollars out of any money in the treasury not otherwise appropriated for the purchase of cotton-seed, and one thousand dollars for the purchase of tobacco-seed, under the superintendence of the Secretary of the Interior, for general distribution; but the provision was that the cotton-seed should be purchased from places where cotton was grown, as far north as possible.

3. Referring to those two acts of Congress, the claimants allege that the Secretary of the Interior appointed William L. Hodge to procure the cotton-seed as authorized in the place for which the vessel was embarked, and to which she was proceeding at the time of the seizure. They plead the letter of the Secretary of the Interior in their answer as a license and permit from the government, and as a document affording a full defence to the allegations of the libel. Substance of the letter is as follows: "Congress having authorized this department to procure cotton-seed for planting in the loyal States, I hereby authorize and appoint you to procure a cargo of the same in Virginia, and bring it to Baltimore, this department to have the privilege to take such portion of said cargo as it may require, not exceeding one-half, at the actual cost and charges." Statement of the letter also, was, that it "will be your authority to procure said seed," and contained a request to all parties in the employment of the United States to allow the appointee to pass freely for that purpose. Answer of the claimants also shows that the Secretary of the Navy, on the twenty-fifth day of April following, indorsed the letter of appointment in the terms following, to wit: "Naval officers in command of ships of war will respect the inclosed, and will afford protection in waters under their control and jurisdiction inside the capes of Chesapeake Bay."

4. Sufficiency of the defence is denied by the United States upon various grounds, but in the view taken of the case there is no necessity of examining more than two of the series. 1. They deny that the Secretary of the Interior had any authority under the appropriation act to license or permit the transportation of merchandise from any loyal State

The judgment of the District Court must be reversed, and the cause remanded for a new trial; and it is

SO ORDERED.

UNITED STATES v. SCOTT.

Upon a comparison of the 25th section of the act of 3d March, 1863, passed during the rebellion, "for enrolling and *calling out* the national forces, and for other purposes," with the 12th section of the act of 24th February, 1864, enacting that any person who shall forcibly resist or oppose any *enrolment* of persons for military service, &c., shall be punished, &c.; *held*, that the former act is limited to the prevention of resistance to the *draft*, and the latter to preventing resistance to the *enrolment*. Comparing the two acts together, the latter one is to be regarded as a legislative construction of the first, by which a service in relation to the draft, is not a service in relation to the enrolment.

ON the 3d March, 1863, Congress, with a view to enable the government to put down the rebellion, which was then exerting itself to destroy the nation, passed "An act for enrolling and *calling out* the national forces, and for other purposes."* This act creates boards of enrolment, and prescribes their duties.

By one section, each board was to be composed of the provost marshal of the district as president, and two other persons, to be appointed by the president, one of whom was to be a licensed and practising physician and surgeon.

By another, the board was to appoint enrolling officers, whose duty it should be to enrol all persons of their districts subject to military duty, noting their age and places of residence, and to report all to the board of enrolment, who were to consolidate the names "into one *list*."

By another section it was enacted, that whenever it might be necessary to call out the national forces for military services, *the President* might assign to each district the number

Maynard v. Maynard, 10 Massachusetts, 456; Wiggins v. Lusk, 12 Illinois, 132; Roosevelt v. Carow, 6 Barbour, 194; 2 Washburn on Real Property, 581.

* 12 Stat. at Large, 731.

of men to be furnished by it; and thereupon the enrolling board, "under the direction of *the President*," had power to make a draft of the required number, and a complete roll of the names of the persons so drawn, and the persons so drawn were to receive notice of the fact, requiring them to appear at a designated rendezvous to report for duty.

Another section required, that all persons who had been drafted and received notice should, on arriving at the rendezvous, be inspected by the surgeon of the board, who was to report to the board the physical condition of each one; and that all persons drafted and claiming exemption from military duty, on account of disability or any other cause, should present their names to the board, whose decision as to their right of exemption should be final.

The 16th section authorized the board to discharge any excess of numbers; and provided that the expenses connected with the enrolment and draft, including subsistence while at the rendezvous, should be paid from the appropriation for enrolment and drafting, under such regulations as the President of the United States should prescribe.

By the 25th section of this act it was enacted,

"That if any person shall resist any *draft* of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such *draft;* or shall assault or obstruct any officer in making such *draft*, or in the performance *of any service in relation thereto;* or shall counsel any person to assault or obstruct any such officer; or shall counsel any drafted men not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding $500, or by imprisonment, not exceeding two years, or by both of said punishments."

On the 24th February, 1864, Congress passed an act "to amend" the former one.* This amendatory act recognizes

* 13 Stat. at Large, 8.

the old "boards of enrolment;" declaring that they "shall *enrol* all persons liable to *draft*;" and section three of the act declares that if the quotas are not made up within a time fixed by the President, the *provost marshal* of the district shall, under the direction of the provost marshal general, "make a draft for the number deficient."

The 12th section of this amendatory act reads as follows:

"That any person who shall forcibly resist or oppose any *enrolment*, or shall incite, counsel, encourage, or who shall conspire or confederate with any other person or persons, forcibly to resist or oppose any such *enrolment;* or who shall aid or assist, or take any part in any forcible resistance or opposition thereto; or who shall assault, obstruct, impede, or threaten any officer or other person employed in making or aiding to make any such *enrolment*, or employed in the performance, or aiding in the performance, of any service in any way relating thereto, &c., shall, upon conviction, be punished by fine not exceeding $5000; or by imprisonment not exceeding five years; or both of said punishments, in the discretion of the court. And in cases where *such* assaulting shall produce the death of such officer or other person, the offender shall be deemed guilty of *murder*, and upon conviction, &c., be punished with death, &c. And nothing in this section shall be construed to relieve the party offending from liability, under proper indictment or process, for any crime against the *laws of a State.*"

The amendatory act repeals so much of the former act as may be inconsistent with it.

In this state of the statutes, Scott was indicted, in the Circuit Court for Indiana, under the above quoted 12th section of the amendatory act of 1864, for the murder of Eli McCarty. The indictment charged that McCarty was murdered while in "the performance of his legal service in relation to the *enrolment* of the national forces;" but in stating more particularly what that service was, it was alleged to be the "*serving with notice the enrolled and drafted men*, requiring them, as such enrolled and drafted men, to appear, &c., and report for military duty."

Scott was tried and found guilty. But on a motion in

arrest of judgment, the judges of that court were divided in opinion upon the question, whether the services of McCarty, in notifying to "enrolled and drafted men" to appear at the designated rendezvous "and report for military duty," considered in connection with the other averments in the indictment, constituted any employment in the performance, or in aiding in the performance, of any service in any way relating to the *enrolment* mentioned in the said 12th section?

The ground of the query doubtless was—as McCarty was engaged in notifying to *enrolled* and *drafted* men to appear at the place of rendezvous—that this presupposed not only a completed enrolment, but a draft in pursuance of it; and the work in which he was engaged had direct relation to the draft, and necessarily followed it. Could the court, then, pass over the important act of the draft, from which the duties of McCarty directly resulted, and without which he would have had no power to act, and attach the service, in the performance of which he was engaged, to the *antecedent* act of enrolment?

The division being certified here, the question, whether the service of a *notice of the draft* was a service relating to the *enrolment*, within the meaning of the 12th section of the act of 1864, was now before this court for resolution?

Mr. Speed, A. G., and Mr. Coffey, special counsel of the United States, contended (*Messrs. McDonald and Niblack, contra*) that the act of March 3, 1863, to which the one under which Scott was indicted is an amendment, provided a *system* for the enrolment and calling into service of the military forces of the country; that the execution of the details of the act was intrusted to three officers, called a board of enrolment; that the duties of this board did not end with the ascertainment of the names of persons liable to a draft and placing them on a list kept for that purpose, but extended to all acts necessary to place the drafted man in actual service, and under the control of his military commander; that the word "enrolment" was used as a general term, and included *all* the services required to put the drafted man into such ser-

vice and under such control; that the law intended to prevent resistance to any lawful act of this board, and to protect the lives of its members and their agents, while engaged in such service; and the counsel inferred as a conclusion that the answer should be in the affirmative, and with the effect, of course, of not making any arrest of judgment.

Mr. Justice MILLER delivered the opinion of the court.

The argument made in behalf of the United States is entitled to much consideration, and if there were nothing in the other provisions of the two statutes which have been discussed, to lead to the inference that Congress used the word enrolment in a narrower sense than the government would assert, it is not improbable that the court would assent to the soundness of the proposition made.

It is to be observed, however, that this construction of the word enrolment must depend entirely upon the statute for its support, as there is nothing in the derivation of the word, or in its ordinary use, which would justify such a meaning. It may be defined to be the act of inserting in a list or roll; and in reference to the purpose of calling the able-bodied men of the country into its service, its usual meaning is fully satisfied when the names of the persons liable to such service are placed on a roll or register. We accordingly find that the first duty imposed by the act on this board of enrolment, is to ascertain who those persons are, and place their names on a register. This catalogue is properly called the roll, and the completion of it, the enrolment of the military force of the country.

The title of the act of 1863, which is referred to and incorporated into the amendatory act of 1864, confirms this definition of the word enrolment. It is called "An act for enrolling *and calling out* the national forces, and for other purposes." Here the word enrolling is not used as the equivalent for all the acts necessary to bring the soldier into service; for it is implied that the enrolling is one thing, and the calling out is another. Otherwise, these last words are without meaning.

A further examination of the two statutes tends still more to confirm this view of the signification attached to the word enrolment. By those acts the boards of enrolment are directed to ascertain the persons liable to military duty, to determine their exemptions, to classify them and make proper lists of them; and there their duty, as a board, ceases, so far as it depends on the statute. They have no authority, under the statute, to make a draft, or to call out the forces. This is dependent on the proclamation of the President. The enrolment may be completed and all the duties of the board performed and ended, without a draft taking place. How, then, can it be said that the enrolment includes the draft?

Again, the enrolment is a matter which is under the joint control and supervision of all three of the officers who constitute the board. But by section three of the act of 1864 the provost marshal alone is charged with the duty of making and supervising the draft.

Looking at these provisions of the act, the conclusion would seem to be, that if the word enrolment, as used in section twelve of the act of 1864, is to have the enlarged meaning which is contended for, it must have a different meaning there from that which belongs to it and its cognate words in other parts of the two acts on the same subject.

But if we consider attentively section twenty-five of the original act of 1863, in connection with the section which we are called upon to construe, we shall be forced to the conclusion that the word enrolment in the latter, does not include the draft.

By the former it is enacted, that if any person shall resist any draft of men enrolled under this act, or shall counsel or aid any person to resist any such draft, or shall assault or obstruct any officer making such draft, or in the performance of any service relating thereto, such person shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both such fine and imprisonment.

It will hardly be asserted that the act of 1864 repeals this

provision of the act of 1863; for there is no express repeal, and repeals by implication are allowed only when the two provisions are so inconsistent that they cannot both be permitted to stand. No such inconsistency exists in this case; for using the words *draft* and *enrolment* in their ordinary sense both acts can stand,—the one punishing resistance to the enrolment, and the other resistance to the draft.

If both these sections, in these two acts, are to stand, it is impossible to construe them both as defining and punishing the offence of resisting the draft: first, because the punishment denounced by the act of 1863 is limited to a fine of five hundred dollars, or two years' imprisonment, or both, while the punishment prescribed by the act of 1864 may extend to a fine of five thousand dollars, or imprisonment for five years, or both; secondly, because the act of 1863 describes and well defines offences relating to the draft, and says nothing about offences relating to the enrolment, while the other, with equal clearness, defines offences relating to the enrolment, and says nothing of the draft.

It may be said that the act of 1863 makes no provision for an assault resulting in death, while that of 1864 does; and therefore the provisions of the latter should be made to cover cases where the party murdered was engaged in a service relating to the draft. It is possible, if the attention of Congress had been called to the omission, it would have been supplied; but certainly no court can go so far as that, in construing a statute whose penalty is death.

To make a party guilty of murder under the act of 1864, it is clear that the assaulting and resistance from which the the death results, must be an assault or resistance of a person engaged in precisely the same service as that which subjects the guilty party to fine and imprisonment, when it does not so result. The definition of the service in which the officer assaulted was engaged, can have no more liberal interpretation in the one case than the other. We have already shown that this does not include service in relation to the draft.

It is not difficult to explain the motives which governed

Syllabus.

Congress in enacting section twelve of the act of 1864. At the time the act of 1863 was passed, it was not anticipated that any trouble would be made to the officers engaged in merely obtaining the names of persons liable to draft, while it *was* supposed there might be some resistance, in particular cases, to the enforcement of the actual draft. But a year's experience showed many defects in the act of 1863, requiring amendment. Among these it was found that resistance to the enrolment was a thing to be expected, quite as often as resistance to the draft. The extent and malignity of this resistance had also been found to be greater than had been anticipated, and the increased demand for soldiers, rendered more stringent legislation necessary. Hence Congress, among many other amendments, provided for the case of resistance to the enrolment, and in doing so, made the penalty heavier than what it had provided for resisting the draft, and added a provision for punishment in cases of resistance resulting in the death of an officer or agent engaged in making the enrolment. That it did not provide for a similar homicide occurring in a service relating to the draft, may have been an omission, but not a remarkable one, when we consider the many other weighty matters which the pressure of the rebellion forced on its attention, and also that the law of the State made full provision for cases of murder.

QUESTION ANSWERED IN THE NEGATIVE.

[See the next case.—REP.]

UNITED STATES v. MURPHY.

1 Under the second section of the act of 8th August, 1840, "to regulate the proceedings in the Circuit and District Courts," and which, after authorizing the transfer of criminal causes from either court to the other on motion of the district attorney, says that "the court to which such remission is made, shall, after the order of remission is filed

therein, act and proceed in the case as if the indictment and all the other proceedings in the same had been originated in said court," an indictment may be remitted from the District Court to the Circuit Court, though it have come into the District Court originally only by being sent there from the Circuit Court. And a demurrer to the indictment made in the District Court, may properly receive a joinder in the Circuit Court.

2. The twenty-fifth section of the act of 3d March, 1863, "for enrolling and calling out the national forces and for other purposes," must be construed by the twelfth section of the amendatory act of 24th February, 1864; and so construed it does not embrace services in relation to an *enrolment*.

AN act of Congress, passed during the late rebellion, entitled "An act for enrolling and calling out the national forces, and for other purposes," and which has numerous provisions tending to prescribe a mode of giving effect to its purpose, provides in its 23d section, that

"If any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel, or aid any person to resist any such draft, or shall *assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto, or shall counsel any person to assault or obstruct any such officer*, such person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and upon conviction thereof be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments."

This act was passed March 3, 1863.

On the 24th February, 1864, Congress passed an act amendatory of it. The 12th section of this amendatory act runs thus:

"That any person who shall forcibly resist or oppose any *enrolment*, or shall incite, counsel, encourage, or who shall conspire or confederate with any other person or persons forcibly to resist or oppose any such *enrolment*, or who shall aid or assist, or take any part in any forcible resistance or opposition thereto, or who shall assault, obstruct, impede, or threaten any officer or other person employed in making or aiding to make any such *enrolment*, or employed in the performance, or aiding in the per-

formance of any service in any way relating thereto, &c., shall, upon conviction, be punished by fine not exceeding $5000, or by imprisonment, &c. And in cases where *such* assaulting, &c., shall produce the death of such officer or other person the offender shall be guilty of *murder*, and upon conviction, &c., be punished with death."

The amendatory act repeals so much of the former act as may be inconsistent with it.

In July, 1863, that is to say *before* the passage of the act last mentioned, but after the passage of the one of March 3, 1863, and while *it* alone was in force, a certain Mrs. Murphy, with two other "married women" of Milwaukie, were indicted in the *Circuit* Court for Wisconsin, for assaulting and obstructing Patrick Finney, "*an enrolling* officer" for that district, "duly appointed as such by the board of enrolment organized under and by virtue of an act of the Congress of the United States of America, approved on the third day of March, A. D. 1863, entitled '*An act for enrolling and calling out the national forces, and for other purposes*,' in making a draft of men enrolled under said act into the service of the United States, and in the performance of service in relation thereto, *to wit, in making an enrolment of persons subject to do military duty in said district, for said draft;* and that they then and there did violently strike and beat the said Patrick, *enrolling* officer as aforesaid, by means whereof he was grievously hurt and wounded; and did counsel certain persons to assault and obstruct the said Patrick, enrolling officer as aforesaid, against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided."

The indictment thus pending in the *Circuit* Court, that court, in October, 1863, remitted the case, on motion of the district attorney, to the *District* Court, where the defendants filed a general demurrer. In April, 1864, the District Court on the motion of the same district attorney, remitted the case *back* to the Circuit Court; and in this last court the United States joined in the demurrer.

These remissions, forward and back, were conceived by

the district attorney to be warranted by the act of Congress of 8th August, 1846. That act thus ran:

"Whenever the district attorney shall deem it necessary, it shall be lawful for any Circuit Court, in session, by order entered on its minutes, to remit to the next term or session of the District Court of the same district any indictment pending in the said Circuit Court, when the offence or offences therein charged may be cognizable by the said District Court; and in like manner it shall be lawful for any District Court to remit to the next term or session of the Circuit Court of the same district any indictment pending in the said District Court; and such remission shall carry with it all recognizances, processes, and pleadings pending in the case in the court from which the remission is made, *and the court to which such remission is made shall, after the order of remission is filed therein, act and proceed in the case as if the indictment and all other proceedings in the same had been originated in said court.*"

The demurrer coming on to be argued, the Circuit Court was divided in opinion as to the questions:

1st. Whether the court had jurisdiction, the indictment having been found in the Circuit Court, remitted to the District Court, and by the District Court again remitted into this court.

2d. Whether the offence charged in the indictment, namely, an assault and obstruction of an officer in making an enrolment of men for military duty, is embraced in the 25th section of the act of 1863, as an assault or obstruction of an officer in making the draft or in the performance of services in relation thereto.

And these two questions were now here for resolution.

Mr. Assistant Attorney-General Ashton argued them in behalf of the United States; no one contra.

Mr. Justice MILLER delivered the opinion of the court.

We are of opinion that under the circumstances of this case, the Circuit Court had jurisdiction of the cause.

We see no reason in the nature of the transaction, nor in

the language of the statute of 8th of August, 1846, under which the remission is supposed by the counsel of the United States to be justified, why a case brought into the District Court by an order of this kind should not be sent back under proper circumstances. The order can only be made on the motion of the district attorney, or whenever in the opinion of the District Court difficult and important questions of law are involved in the case. There is, therefore, no danger of collision between the courts on account of such orders; and as they tend to the despatch of business, and to sound decisions on legal propositions, there is no reason for limiting the rule further than the language of the statute requires.

As respects the second question.—The defendants were indicted for assaulting an officer while engaged "in making an enrolment of men subject to do military duty." This language describes with entire accuracy the offence provided for by the 12th section of the act of February 24, 1864. But the indictment was found before that act was passed. It was found under the 25th section of the act of March 3, 1863, on the supposition that making an enrolment was a service relating to the draft; and the judges divided on the question whether this was so, within the meaning of the last-mentioned act.

If Congress had not passed the amendatory act of February 24, 1864, it might very well have been asserted that making an enrolment of persons liable to draft, was a service relating to the draft; for being a necessary preliminary to putting the draft in force, it bears a very close relation to it. We have, however, held in the case of the *United States* v. *Scott*, just preceding, upon a comparison of the 25th section of the act of 1863, with the 12th section of the act of 1864, that the one is limited to the prevention of resistance to the draft, and the other to preventing resistance to the enrolment. Comparing the two acts together, the later one must be held to be a legislative construction of the first, by which a service in relation to the enrolment cannot be held to be a service in relation to the draft.

The first of the questions certified to us must be answered in the affirmative, and the second in the negative.

ANSWERS ACCORDINGLY.

ROGERS v. BURLINGTON.

1. Where a demurrer to a declaration in the Circuit Court is improperly sustained, and judgment is rendered accordingly, the case may be re-examined here upon a writ of error without any formal bill of exceptions.
2. Power "to borrow money for *any* public purpose" gives authority to a municipal corporation to borrow money to aid a railroad company, making its road as a way for public travel and transportation; and, as a means of borrowing money to accomplish this object, such municipal corporation may issue its bonds, to be sold by the railway company, to raise the money.
3. Power to issue the bonds being shown, the municipal corporation, as against *bonâ fide* holders of them for value, is estopped to deny that the power was properly executed.

THE act of incorporation of the city of Burlington, in Iowa, vested the government and legislative power of the city in a city council, composed of the mayor and a board of aldermen. In addition to conferring various police powers, it authorized the city council to establish and organize fire companies, and provide them with proper engines, and such other instruments as might be necessary to extinguish fires; to establish and construct landing-places, wharves, docks, and basins within the city; to cause all grounds within the city, where water should at any time become stagnant, to be raised, filled up, or drained; and to cause to be opened, paved, repaired, or improved, any street, lane, alley, market-space, public landing, or common. The act then provides, in its 27th section, as follows:

"That whenever, in the opinion of the city council, it is expedient to *borrow money* for any public purpose, the question

shall be submitted to the citizens of Burlington, the nature and object of the loan shall be stated, and a day fixed for the electors of the said city to express their wishes; the like notice shall be given as in cases of an election. The loan shall not be made unless two-thirds of all the votes polled at such election shall be given in the affirmative."

Assuming to act under this section, the city council, on the 23d of June, 1856, passed

"*Ordinance No.* 44.

'An ordinance to authorize a *loan of city bonds* to the Burlington and Missouri River Railroad Company, &c.

"Whereas, at a meeting of the city council, held on the 19th of May, 1856, a resolution was adopted, authorizing the mayor to call an election, and to submit the question, whether or not the city *issue and lend to the Burlington and Missouri River Railroad Company* $75,000, in the *bonds* of said city; said bonds payable in twenty years from date of issue, with an interest of 10 per cent. *per annum*, and to be secured by the first mortgage bonds of said company, &c. And whereas the said election was duly and legally held on the 2d of June, 1856, and the said question was legally decided in favor of the same, whereby said loan is duly authorized to be made. Therefore,

"*Be it ordained, by the City Council of the City of Burlington,*

"1st. The bonds of the city, to the extent of $75,000, and in such amounts as the mayor may direct, bearing interest, and payable as aforesaid, and duly signed, sealed, and authenticated, and with coupons for interest, be issued by said city.

"2d. That the mayor execute, with the said company, a contract of loan thereof, taking therefor the obligation of said company, and as collateral security therefor the mortgages aforesaid, and deliver said bonds to said company, and receive said mortgages."

Under the authority of this ordinance, bonds of the city to the amount of $75,000 were issued. The bonds were coupon bonds in the ordinary form; except in so far, perhaps, as they declared on their face that they were issued, by the city of Burlington, under Ordinance 44, to authorize a loan of city bonds, to the amount of $75,000, to the Bur-

lington and Missouri Railroad Company, and as they contained a copy of the ordinance printed at large upon their back.

Certain of these instruments having got, after this, into the hands of one Rogers, a *bonâ fide* holder for value, and the interest being unpaid, he brought suit in the Circuit Court for Iowa to recover it.

The defendant demurred, among other grounds, on the following:

1st. That the petition did not aver nor show that the city had any authority to issue the bonds therein described.

2d. That the bonds on their face showed that they were not issued for any municipal purpose, but as a loan of the credit of the city to the Burlington and Missouri River Railroad Company.

3d. That there was no law of the State of Iowa authorizing the city to issue such bonds, or to lend her credit to any railroad company.

The demurrer was sustained, and judgment rendered for the defendant. To review this judgment, the case was brought here on writ of error.

Messrs. Ewing, Browning and Phelps, for the City of Burlington: The question before the court arises on demurrer, and is a precise one. We assert that the city had no authority to issue the bonds sued upon; and that, having been issued without authority, they are null and void, and cannot be recovered upon. More particularly, our position is, that this is not a case of the irregular and informal execution of an admitted power, but the performance of an act *without power;* one, therefore, which no formality of execution can validate.

1. The well-settled and familiar principle of law is, that a corporation can bind itself only in pursuance of the powers given by the act of incorporation, and not otherwise.*

* Dartmouth College v. Woodward, 4 Wheaton, 636; Augusta v. Earle, 13 Peters, 584; Bunyan v. Lessee of Costar et als., 14 Id. 129; Perrine v. The Chesapeake and Delaware Canal Company, 9 Howard, 184.

2. And all persons dealing with a corporation are bound to take notice of the extent of its powers. They are bound, at their peril, to know whether the corporation has competent authority to make the contract.

3. It is a further well-settled rule of English and American law, that every corporation is *limited, as to its powers, by the objects to be accomplished*—to the sphere of action prescribed by its charter.*

4. And these principles are as applicable to public as to private corporations—to municipal as to commercial.

5. Moreover, the powers of a corporation can never be extended, by implication, beyond the objects of its creation. If a clause of its charter be susceptible of two constructions, one limiting it to the purposes of its creation, and the other extending its powers to objects foreign to the general scope of its charter, the former is to be adopted.†

6. And if a corporation exceeds its powers, and makes contracts, and issues evidences of indebtedness, not authorized by its charter, such contracts and evidences of indebtedness are void, and cannot be enforced against the corporation.‡

7. In this charter, section 27 authorizes *borrowing* money for *public purposes*. But the words used are to be construed as referring to the powers elsewhere granted by the charter; and this section was intended to enable the city to exercise the powers conferred by the charter, or rather to prevent their defeat for want of cash on hand, and not as a sweeping authority to borrow money at their discretion for any purpose whatever. Moreover: A railroad company is a private corporation, and borrowing money to lend to *it* is not borrowing money for a public purpose.

* Ohio Life Insurance and Trust Company v. The Merchants' Insurance and Trust Company, 11 Humphreys, 19; Broughton v. Salford Water Works, 8 Barnewall & Alderson, 1; Beatty v. Lessee of Knowler, 4 Peters, 169, 171.

† Perrine v. The Chesapeake and Delaware Canal Company, 9 Howard, 185.

‡ Attorney-General v. Life and Fire Insurance Company, 9 Paige, 476; Bank of Chillicothe v. Dodge, 8 Barbour, Supreme Court, 233.

8. But, even if it were admitted that the city of Burlington had authority to borrow money for other objects than than those pertaining to the good order and government of the city, such admission would not uphold these bonds. These were issued on *a contract of lending—not of borrowing.* It was a lending of the credit of the city to a railroad corporation; not borrowing money for any purpose whatsoever, either public or private. Power given to a corporation to *borrow* money, does not include the power *to lend* either its money or its credit.*

9. The cases on county and city bonds heretofore considered by this court—*Mercer County* v. *Hackett; Gelpcke* v. *City of Dubuque*,† *and others*—have been decided against the corporations resisting payment, mainly on the ground that the bodies issuing the bonds were *estopped* from making the defences which they sought to interpose. In none of these cases, however, was it a question of *power;* but a question, whether a power, *admitted to exist*, had been executed with technical precision. In all of them the bonds recited that the requirements of the law had been complied with. The cases were applications of the rule, that where a corporation acts within the sphere of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard, it is estopped to deny recitals of conformity to the law, upon which others have been induced to act.‡ Here, however, the objection is not to the mode and manner of executing a power, but that there is a total defect of power. If so, there *can* be no estoppel. No formality of execution, however exact, can give validity to an act which the corporation had no right, under the law, to do; there being no estoppel against a legal disability.§

* Colman v. Eastern Counties Railway Company, 10 Beavan, 1 to 14; The Caledonian Railway Company v. The Hellensburg Harbor Trustees, 89 English Law and Equity, 28; Smith v. The Alabama Life Insurance and Trust Company, 4 Alabama, 561.

† 1 Wallace, 88, 175.

‡ See Cincinnati City v. Morgan, *supra*, 275.

§ Fairtitle v. Gilbert, 2 Term, 169.

10. The bonds show upon their face—in the recitals, we mean, upon them—the object for which they were issued. Had they been obligations, without explanatory recitals, they might have been presumed to be for a lawful consideration; issuable within the corporate powers; and, under decisions of this court, the city would have been estopped to show the contrary. But they show that they were made, not as a means of borrowing money, or securing the payment of money borrowed for any purpose public to the city, in the sense in which the statute giving the power must be construed, but as a loan to a railroad company, with which the city had no connection, and with which, as a matter of fact, it does not appear to have had the power to connect itself.

Of course, all parties had notice of the charter of the city; a public act. We need not enlarge on that point.

Mr. F. A. Dick, contra, for the bondholder, Rogers, plaintiff in error, contended that under numerous decisions made in former years in the Supreme Court of Iowa* (and only departed from of late years), as well as by not less numerous ones made in the last two years in this court†—the city had power under its charter to borrow money to subscribe to the stock of the company and issue bonds in payment; that this power to *borrow* money authorized the issue that had been made to the company, and that the bonds were regular, valid, and binding on the city.

Mr. Justice CLIFFORD delivered the opinion of the court.

Corporation defendants were authorized by their charter to borrow money for any public purpose whenever in the

* State v. Bissell, 4 G. Greene, 328; Clapp v. County of Cedar, 5 Iowa, 15; Ring v. County of Johnson, 6 Id. 265; McMillen v. Boyles, Id. 304; McMillen v. County Judge of Lee County, Id. 391; Games v. Robb, 8 Id. 193.

† Gelpcke v. Dubuque, 1 Wallace, 175; Mercer County v. Hackett, Id. 83; Seybert v. City of Pittsburgh, Id. 272; Van Hostrup v. Madison City, Id. 291; Meyer v. City of Muscatine, Id. 384.

opinion of the city council it should be deemed expedient to exercise that power.

Material conditions annexed to the power, as conferred, were that the question of borrowing, when proposed, should be previously submitted to the citizens of the city, and that the loan should not be made unless two-thirds of all the votes polled at such election should be given in the affirmative.

Pursuant to that authority the defendants voted to issue and lend to the Burlington and Missouri River Railroad Company seventy-five thousand dollars in the bonds of the city, payable in twenty years, with an interest of ten per centum per annum, and to be secured by the first mortgage bonds of the company on the second section of the road. Directions to the mayor of the city, as expressed in the ordinance, were that he should issue the bonds and execute with the company a contract of loan thereof, taking therefor the obligation of the company, and the stipulated mortgage as collateral security for the bonds.

Ordinance under which the bonds were issued was passed on the twenty-third day of June, 1856, and the same is fully set forth in the record.

The action was assumpsit, and the declaration was founded upon certain interest coupons annexed to the bonds, which had become due and payable prior to the commencement of the suit.

Declaration contained twenty counts, and the defendants demurred specially to the entire series. Principal causes shown for the demurrer were:

1. That the declaration did not aver nor show that the city had any power or authority to issue the bonds therein described.

2. That the bonds on their face showed that they were not issued for any municipal purpose, but as a loan from the city to the beforementioned railroad.

3. That there is no law of the State authorizing the city to issue such bonds, or to loan her credit to any railroad.

Parties were fully heard in the court below, and the court

sustained the demurrer and rendered judgment for the defendants.

I. Plaintiff excepted to both those rulings, and a bill of exceptions to that effect, in due form, is exhibited in the record; but it is unnecessary further to advert to it, as it is well settled that the ruling of the Circuit Court in sustaining or overruling a demurrer to a declaration and rendering judgment for the wrong party may be re-examined in this court by a writ of error without any formal bill of exceptions.*

Reason for the rule is, that the error is apparent on the record; and it is generally true that where the error is apparent on the face of the record a bill of exceptions is unnecessary.†

II. Substance of the defence in this case upon the merits, as presented in argument, may be stated in three propositions:

1. That the defendants, under their charter, had no lawful authority to issue the bonds described in the declaration, and that inasmuch as the bonds were issued without authority they were null and void, and, consequently, the plaintiff cannot in any point of view maintain the suit.

2. That municipal corporations are limited as to their powers by the objects to be accomplished by their creation, and to the sphere of action prescribed in their charters; and that the corporation defendants, under a fair application of those rules, could not borrow money or issue their bonds for the object specified in the ordinance, because such an object was not a public purpose within the meaning of their charter.

3. That the defendants, even if they have authority to borrow money for objects other than those pertaining to the good order and proper government of the city, could not issue the bonds in this case because the contract under which

* Gorman et al. v. Lenox, 15 Peters, 115; Suydam v. Williamson, 20 Howard, 486.

† Bennet v. Butterworth, 11 Howard, 669; Slocum v. Pomeroy, 6 Cranch, 221; Garland v. Davis, 4 Howard, 131; Cohens v. Virginia, 6 Wheaton, 410.

the bonds were issued was a contract of lending and not of borrowing, and that the power given to the defendants to borrow money did not authorize them to lend either their money or their credit.

1. Reasonable doubt cannot be entertained that the terms of the charter, if valid, are sufficiently comprehensive to confer upon the defendants the power to borrow money for such a public purpose as that described in the ordinance under which the bonds were issued, unless it be shown that those terms have in some way been shorn of their usual and ordinary signification.

Charter of the defendants was granted on the tenth day of June, 1845, by the Territorial legislature, acting under its organic act.*

Subject to certain exceptions, not material to be noticed, the sixth section of the act provided that the legislative power of the Territory should extend to all rightful subjects of legislation; and there can be no question that the Territorial legislature, acting under that general delegation of legislative power, had the authority to incorporate the defendants and confer upon them, as such corporation, the functions specified in their charter.†

Citation of authorities in support of the proposition seems to be unnecessary, as it is not denied, and, therefore, it may be assumed in the further consideration of the case that the corporate powers vested in the defendants, as expressed in their charter, were legitimately conferred.

Power to borrow money for a public purpose, within the meaning of the provision, is conferred by the charter in express terms, and there is nothing in the constitution of the State which limits the authority so conferred, or renders it invalid. On the contrary, the constitution of the State, as originally adopted, provided that all laws in force in the Territory which were not repugnant to the constitution, should remain in force until they expired by their own limi-

* 5 Stat. at Large, 235.

† Vincennes University v. Indiana, 14 Howard, 278.

tation, or should be repealed by the General Assembly of the State.*

When the new constitution was adopted it contained no such provision, but the omission was shortly afterwards substantially supplied by a general law re-enacting and reviving all acts in force at the time it went into effect, except such as had been repealed by the General Assembly, or were repugnant to its provisions.†

Validity of the charter, therefore, is established beyond the possibility of a doubt, unless it be assumed that the particular provision authorizing the defendants to borrow money for a public purpose exceeds the constitutional authority of the legislature.

In considering this question it will not be necessary again to advert to the fact that the charter was granted by the Territorial legislature, because it has already been shown that it has the same validity that it would have had if it had been re-enacted by the legislature of the State.

Municipal corporations are created by the legislature, and they derive all their powers from the source of their creation; and those powers are at all times subject to the control of the legislature. Such powers, also, in the absence of any constitutional regulation forbidding it, may be enlarged or diminished, extended or curtailed, or withdrawn altogether, as the legislature shall determine. Construction and repair of highways or streets for public travel within their limits are among the usual purposes of their creation, and the expenses of accomplishing those objects are among their usual and ordinary burdens. Railways, also, as a matter of usage, founded on experience, are so far considered by the courts as in the nature of improved highways, and as indispensable to the public interest and the successful pursuit even of local business, that a State legislature may authorize the towns and counties of the State, through which a railway passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same

* Code 1851, p. 557. † Code 1860, p. 8.

with the view of aiding those engaged in constructing or completing such a public improvement; and that a legislative act conferring such authority is not in contravention of any implied limitation of the power of the legislature. Decisions to that effect have very much increased in number within the last few years, and are constantly increasing both in the State and Federal courts, until it may be said that the rule here laid down pervades the jurisprudence of the United States.

Exceptional opinions advancing the opposite doctrine may be found, but they cannot be regarded as sound, in view of the fact that the weight of authority is very greatly the other way.

Printed argument of the plaintiff shows that the Supreme Court of the State for a series of years held the same views, as appears in some seven or eight of their reported decisions; and it is proper to remark that the reasons given for the conclusions in those several cases are much more satisfactory than those assigned in the more recent decisions which adopt the opposite rule.

Repeated determinations of this court, embracing a period of ten years, have expressed the concurrence of the court in the general current of the decisions upon the subject in the State courts, and it is vain for parties to expect that the court, in the face of those recorded judgments, can come to any different conclusion. Recent as many of those decisions are, it seems unnecessary to incumber the opinion with the names of the cases, or to reproduce the reasons assigned as the basis of the respective judgments. Irrespective of the State decisions it is quite obvious that the decisions of this court control the question under consideration, and, consequently, that no further remark upon the proposition is necessary, except to say that the decision in the case of *Gelpcke* v. *The City of Dubuque*,* although the opinion of the court contains a reference to other statutes, was chiefly founded upon the construction of a provision in the charter

* 1 Wallace, 202.

of that city expressed in the same words as the provision contained in the charter of the defendants. Decision, also, in the case of *Meyer* v. *City of Muscatine*,* is to the same effect. Unless, therefore, it be assumed that no prior decision of this court can furnish the rule in a subsequent controversy, it would seem that the present case is controlled by those decisions.

2. Second proposition submitted is, that the defendants could not borrow money or purchase bonds in aid of the improvement specified in the ordinance, because such a work is not within the usual and ordinary objects to be accomplished by a municipal corporation, and consequently was not a public purpose within the meaning of that phrase as employed in the charter of the city. They admit that the construction of a railroad is a public improvement, and they insist that the phrase public purpose as employed in the charter must be limited in its signification to such public purposes as fall within the usual and ordinary sphere of municipal corporations. Undoubtedly there is much force in the latter suggestion, and it would seem that as applied to many improvements of great public utility, the proposition may well be conceded. None of the decided cases which maintain the power of the State legislatures to authorize such material aid in the construction of railroads decide or even intimate that the power may be exercised without limit, or be extended to a public enterprise entirely foreign to the general objects which the corporation was created to subserve. Those adjudications are not obnoxious to any such charge, but the theory maintained is, that a railroad is nothing more than an improved highway, and that it is as competent for the legislature to authorize a municipal corporation to furnish material aid in the construction of a railroad connected with the same as to construct a highway.

Regarded in that point of view they are analogous objects, and experience shows that the railroad, as well as the high-

* 1 Wallace, 385.

way, is promotive of the highest and best interest of the corporation.*

3. Third proposition is in substance and effect, that the defendants, even if they could borrow money for the object described in the ordinance, could not lawfully issue the bonds in this case, because the contract under which they were issued was a contract of lending and not of borrowing within the meaning of the charter. Evidently the proposition admits that the defendants might borrow money in aid of the improvement described in the ordinance, but the argument is, that in issuing the bonds and delivering them to the company they did not exercise the power in the manner which the charter authorized. Where a municipal corporation was authorized to subscribe to the stock of a railroad company, and to borrow money to pay for the stock subscribed, the Supreme Court of Pennsylvania held, in the case of *Middleton* v. *Alleghany Co.*,† that the issuing of their bonds as a means of making the payment was borrowing money for that purpose, within the meaning of the provision conferring the power, especially as it appeared that the bonds had been received in payment of the subscription. Same court also held in the case of *Reinboth* v. *Pittsburg*,‡ that, where an act of the legislature authorized a municipal corporation to subscribe for stock in a railway as fully as an individual, that the provision gave authority to the corporation to issue their negotiable bonds in payment of the stock, and this court, upon a re-examination of the case, came to the same conclusion.§

Common experience shows that the issuing of bonds by a municipal corporation as material aid in the construction of a railroad is merely a customary and convenient mode of borrowing money to accomplish the object, and it cannot make any difference so far as respects the present question

* Redfield on Railways, 583; Rome v. Rome, 18 New York, 88; Prettyman v. Tazewell Co., 19 Illinois, 406; Bushnell v. Beloit, 10 Wisconsin, 195; Reinboth v. Pittsburg, 41 Pennsylvania State, 278.

† 37 Pennsylvania State, 241. ‡ 41 Id. 278.

§ Seybert v. Pittsburg, 1 Wallace, 272.

whether the bonds as issued by the defendants were sold in the market by their officers, or were first delivered to the company and were by their agents sold for the same purpose. Money was what the company wanted to be expended in the construction of the railroad, and the bonds were issued by the defendants to enable the company to accomplish that purpose. Technically speaking, it may be said that the transaction, as between the company and the defendants was, in form, a contract of lending, but as between the defendants and the persons who purchased the bonds in the market, it was undeniably a contract of borrowing money; and the same remark applies to the transaction in its practical and legal effect upon all subsequent holders of the securities who have since become such for value, and in the usual course of business.

III. Viewed in that light it is unmistakably a contract of borrowing money in the open market, and the rule that a corporation quite as much as an individual is held to fair dealing with other parties, applies with all its force, and we repeat, that corporations cannot by their acts, representations, or silence, involve others in onerous engagements, and be permitted to defeat the calculations and claims which their own conduct has superinduced.*

Perfect acquiescence in the action of the officers of the city seems to have been manifested by the defendants until the demand was made for the payment of interest. They never attempted to enjoin the proceeding, but suffered the bonds to be issued and delivered to the company, and when that was done it was too late to object that the power conferred in the charter had not been properly executed.† Precisely the same objection was made in the case of *Meyer* v. *The City of Muscatine*,‡ but the objection was overruled by this court upon the ground that the object of issuing the bonds was as effectually accomplished by their delivery to the company as they would have been if the defendants

* Bissel v. Jeffersonville, 24 Howard, 300.

† Knox County v. Aspinwall, 21 Id. 544.

‡ 1 Wallace, 392.

themselves had sold them in the market, and that the obligors were not injured by the transaction.

Judgment of the Circuit Court is reversed with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

REVERSAL ACCORDINGLY.

Mr. Justice FIELD (in whose opinion concurred the CHIEF JUSTICE, and GRIER and MILLER, JJ.), dissenting.

I am compelled to dissent from the judgment of the court in this case. I am unable to find any authority for the city of Burlington, either in her charter or in any other legislation of Iowa, to issue the bonds, to recover the interest upon which the present action is brought. Municipal corporations differ from private corporations only in the purpose of their creation. They are equally dependent for their existence, and the powers they can exercise, upon the legislative will. They are limited to the powers specifically granted, and such other powers as are necessary to carry into effect those granted. They can exercise none other, and the plea of *ultra vires* may always be interposed as a defence to the enforcement of any contract or obligation not made or incurred within the limits prescribed. And the rule rests upon the most obvious reasons. The corporation consists of all the inhabitants within the corporate limits; they are the corporators. Thus, in the charter of Burlington, the first clause, after defining the limits of the city, declares that "the inhabitants thereof shall constitute a body corporate and politic." The officers of the corporation, the mayor and city council, constituting its legislative body, are merely the public agents of the corporation, and are bound by all the restrictions which bind other agents acting for their principals. The charter is to them the letter of authority, to which every one may look when called upon to consider the validity of their acts. The corporation can only be bound when these agents keep strictly within their prescribed limits.

But this is not all; the power granted must be exercised substantially in the mode designated. The adoption of the mode to this extent is essential to the validity of any act done. If the charter provide that a measure shall be authorized by ordinance of the council, it cannot be authorized by resolution of that body; if it prescribe a sale at auction, a sale in any other manner is void; if it authorize a borrowing of money upon a vote of the citizens, the money cannot be borrowed in any other way. In all such cases the mode becomes the measure of the power. This is too obvious to require argument; and so are all the adjudications. Thus, in *Head* v. *The Providence Insurance Company*,* Mr. Chief Justice Marshall, in speaking of bodies which have only a legal existence, says: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."†

But still more: the power granted must be exercised for the purpose designated; it is limited to the objects to be accomplished, to the sphere of action prescribed by the charter. If it be given for the construction of a city building, it cannot be exercised for the construction of a city railroad; if it be allowed for the establishment of a public library, it cannot be exerted for the opening of a public market; if it be conferred to enable the corporation to borrow money, it cannot be used to enable the corporation to lend money, or to lend its credit.

These observations are legal truisms. They are elementary principles. They are recognized by all the authorities both of England and America. They are controverted in none, and they envelop the present case on all sides.

Here the authority conferred is to *borrow money;* yet no

* 2 Cranch, 169.

† McCracken v. City of San Francisco, 16 California, 619; The Farmers' Loan and Trust Company v. Carroll, 5 Barbour, 649; The New York Fire Insurance Company v. Ely, 5 Connecticut, 568.

money was borrowed, but the bonds of the city were lent. Borrowing money and lending credit are not convertible terms. The two things which they indicate are essentially distinct and different. The utmost which can be said is, that the railroad company might have borrowed money on these bonds, and thus the transaction would amount to a borrowing of so much money by the city through the railroad company as its agent. The answer to this suggestion is, that there is no authority to be found for constituting the railroad company the fiscal agent of the city. The company having possession of the bonds might dispose of them at any rate of discount which it deemed proper. Could the legislature have intended that the city should be liable in any event to taxation on the supposition that a public enterprise had been aided by its money to a specified amount, when in fact no such sum was ever given for the enterprise?

The question presented is not a new one. In *Gould* v. *The Town of Sterling*,* a statute of New York had authorized the officers of the town to borrow the sum of twenty-five thousand dollars, and pay it over to the president and directors of a railroad company, to be expended by them in grading and constructing a railroad. Instead of borrowing the money, the officers of the town delivered over the bonds of the town to the company in payment for stock, for which they were authorized by the act to subscribe, and the company sold them at a discount. The question was, whether this was within the authority conferred by the act? Mr. Justice Selden, speaking for the Court of Appeals of New York, in an opinion of marked ability, answers the question in the negative. "It is clearly," says that learned justice, "not within its language. No money was borrowed, and nothing else was authorized by the terms of the act. If, however, what was done was the same in effect as if the money had been borrowed and paid over to the railroad company, the difference in form would not be material. But it is plain that neither in respect to the railroad com-

* 23 New York, 458

pany nor the town was its effect the same. If the statute had been pursued, the company would have had a sum equal to the par value of the bonds to expend upon their road. As it was, they were compelled to sell the bonds at a discount in order to realize the money." . . . . "It is true, the town did not itself sell the bonds, nor make any sacrifice upon them. It transferred them to the railroad company at par, in payment for stock for which it was authorized to subscribe. This, however, does not strengthen the plaintiff's case. It was as much a departure from the terms of the statute as if the town had itself sold the bonds at a discount, and was equally inconsistent with the object and intent of the act, which was, that the railroad company should receive a sum equal to the amount of the debt incurred by the town, to expend upon the road, in the completion of which the town was supposed to have an interest. There is, therefore, in this case, not only a literal but a substantial difference between the course pursued and that pointed out by the statute. It follows that the bonds were illegally issued, and were, consequently, void in the hands of the railroad company; and as the referee has expressly found that the plaintiff became the purchaser with full knowledge that the bonds had not been issued for money borrowed, but in payment for the stock of the company, he is in no better situation than the railroad company itself."

I can add nothing to this language, or to the cogency of the reasoning of the learned judge. Every word is applicable to the case under consideration.

I might proceed and show that the purpose for which the bonds in this case were issued, was not within the objects to be accomplished by the charter of incorporation; that those objects were such as are usually contemplated in the creation of a municipal corporation,—the establishment of a local government, the securing of peace, good order, and health within the corporate limits, and the promotion of such measures as would conduce to the general good of the municipality, and that the power to borrow money was restricted to the purposes declared. But it is unnecessary to

pursue the matter further. When the authority to borrow money is made to cover a case of lending credit, it is vain to contend that the "public purpose" prescribed by the charter was limited to any of the purposes for which such charter was created.

This is not a case where the doctrine of estoppel has any application. It is not a case where the purchaser of the bonds was misled by any recitals of conformity to law. Here the statute and the ordinance of the city of Burlington, under which authority to issue the bonds was assumed to exist, are both printed in full in the indorsements upon the bonds; and the ordinance is also referred to on their face. But if this were not so the case would not be changed, as the statute did not authorize the issue of the bonds. No formality of execution, and no extent of recitals could give validity to instruments thus issued. The public agents of the city could not cure the inherent defect in their action arising from want of power, by any amount of representation that they had the requisite authority.

I am clear that the bonds are void, and that the judgment should be affirmed.

Mr. Justice MILLER:

In addition to what has been said by my brother Field, in all of which I concur, I desire to state, that on the 8th of January, 1866, the Supreme Court of Iowa, by a decision which was unanimous, held the bonds which are the foundation of this suit to be void, on the ground that the charter conferred no authority on the city to lend its credit, and that the transaction in this case was a loan of credit, and not a borrowing of money.

UNITED STATES v. CIRCUIT JUDGES.

A proceeding in the District or Circuit Court of the United States under the act of March 3d, 1851,* for the ascertainment and settlement of private land claims in the State of California, is in the nature of a proceeding in equity. A decree of the Circuit Court in one of these cases transferred to it is therefore subject to appeal to the Supreme Court of the United States under the amendatory Judicial Act of March 3d, 1803.†

THE fourth section of an act of Congress of July 1, 1864,‡ "To expedite the settlement of titles to lands in the State of California," provides as follows:

"That whenever the district judge of any one of the District Courts of the United States for California is interested in any land the claim to which, under the said act of March 3, 1851, is pending before him on appeal from the Board of Commissioners created by said act, the said District Court shall order the case to be transferred to the Circuit Court of the United States for California, which court shall thereupon take jurisdiction and determine the same. The said District Courts may also order a transfer, to the said Circuit Court, of any other cases arising under said act pending before them affecting the title to lands within the corporate limits of any city or town; and in such cases both the district and circuit judges may sit."

An appeal pending in the District Court for the Northern District of California from a decree of the Board of Commissioners,—the United States being a party on one side and the City of San Francisco party on the other—was transferred from the District Court to the Circuit under the above section. It was there heard and decided in favor of the city; and the United States, represented by the attorney-general, considering itself aggrieved by the decree, applied in due form to the Circuit Court for an appeal to this court. The application, after full consideration, was denied, on the ground that upon a true construction of the section above quoted no appeal had been provided for.

* 9 Stat. at Large, 631. † 2 Id. 244. ‡ 13 Id. 333.

The section itself, it will be seen, provides for no appeal.

On a petition by the United States for a mandamus to the judges of the Circuit Court to allow one, the question accordingly was whether under the Constitution and different statutes of the United States any appeal lay.

Mr. Assistant Attorney-General Ashton and Mr. Black, for the relators and in support of the motion; Mr. W. W. Cope, contra.

Mr. Justice NELSON delivered the opinion of the court.

The question raised by the present application is a nice one in practice, and is not without its difficulties.

The section itself does not provide for an appeal, and, unless the case is governed by some general law, or established practice of the court derived from acts of Congress, the right of appeal cannot be maintained.

By the 22d section of the Judiciary Act, in connection with the act of March 3, 1803, all judgments and decrees in civil actions, and in suits in equity in a Circuit Court, brought there by original process, or removed there from courts of the several States, or *removed there by appeal from a District Court*, may be re-examined and reversed or affirmed in the Supreme Court. It is said that the present case was not brought into the Circuit by an appeal from the District Court, and hence is not within the provision. The case, as we have seen, comes into the Circuit under the 4th section of the act of 1864, not by appeal, but by an order of the District Court transferring it to the Circuit.

This 4th section was taken from, or part of it, at least, is but a transcript of the 11th section of an act of Congress, passed May 8, 1792. The act provided that in all suits and actions in any District Court of the United States in which it shall appear that the judge is in any way interested, or has been counsel for either party, it shall be his duty to cause the fact to be entered in the minutes of his court, and order an authenticated copy thereof, with all the proceedings in the suit, to the next Circuit Court, which court shall thereupon take cognizance of the case, and hear and deter-

mine the same. And a similar provision will be found in the act of March 2, 1809,* in case of the disability of the district judge to perform the duties of his office during such disability. The cases are transferred by the clerk on the order of the circuit judge. And a like provision is found in the act of March 3, 1821,† in case of the relationship of the judge to either of the parties to the suit.

Now, these acts, as will be seen from their date, have been in force from an early period, and it has never been doubted but that the judgments and decrees rendered in the Circuit Court were subject to be re-examined, reversed, or affirmed by the Supreme Court, as in any other case under the 22d section of the Judiciary Act. A case was before us at the present term that had been transferred to the Circuit under the act of 1792.

The law providing for the transfer of the case from the District Court to the Circuit, was regarded as enlarging the cases provided for in the 22d section; and virtually incorporated therein a removal by transfer, when thus authorized, to the Circuit, in addition to the cases of removal by appeal as provided for in that section.

It will be observed that this 4th section of the act of 1864 provides for a compulsory transfer only in the case of an interest of the judge in the land in controversy. But suppose he has been counsel in the cause, or disabled by sickness, or by reason of relationship to either of the parties, this 4th section does not provide for the disability. The cases were, however, already provided for by the acts of 1792, 1809, and 1821, and they are peremptory, that on application of the counsel of either party, the case shall be transferred to the Circuit Court. The construction, therefore, contended for, would present the singular inconsistency of a denial of an appeal, in case of the interest of the judge in the subject-matter of the controversy; but its allowance in case of a transfer, when he had been counsel in the cause, or general disability to discharge his duties, or in case of relationship to either of the parties.

* 1 Stat. at Large, 534. † 3 Id. 643.

The remaining clause of this section makes it optional with the judge to transfer other causes arising under the act of 1851, affecting the title to lands within the corporate limits of a city or town, and then both judges may sit.

But whether the transfer is optional or compulsory, cannot vary its legal effect. If made at all, it must be by the authority of the 4th section—by the authority of law—the same as in the case of interest of counsel, or general disability of the judge, or from relationship, and falls within the practice applicable to these cases.

This clause is subject to an additional objection; for, as the transfer is optional, and may be granted or not, if the decree or judgment of the Circuit Court is not matter of appeal, or writ of error, whether any appeal be permitted or not in the case, is within the power of the district judge. If he retains the case and determines it, an appeal, it is admitted, lies; if he transfers the case, and the decree or judgment is in the Circuit, it must be denied. We think Congress could hardly have intended this result. It places the right of an appeal not on the judgment of the circuit judge who rendered it, but in the discretion of the judge of the District Court.

It is urged that the proceedings under the act of 1851, concerning California land titles, are special, and are not to be regarded as cases either in law or equity. The law is general, and concerns the title to the whole of the real property of the State. Many of the provisions of this law are taken from the act of May 26, 1824, which provided for the trial of claims under imperfect Spanish and French grants within the State of Missouri before the district judge of that district. These were grants under the protection of the treaty of San Ildefonzo. The proceedings were informal, like those under the act of 1851. The claims were to be determined according to the law of nations, the stipulations of the treaty, the several acts of Congress in relation thereto, the laws and ordinances of the government from which the titles were derived. The proceedings were regarded as in the nature of a proceeding in equity, though the analogy

was not very close, the decision on the claim being in the form of a decree.

The proceedings under the act of 1851, we think, should be regarded in the same light—in the nature of a proceeding in equity. The form of the decision has always been in conformity thereto. An appeal is the appropriate mode of bringing the case up to the appellate court for review, and such has been the uniform practice under the act.

Upon the whole, our conclusion is, that an appeal lies in behalf of the United States.

Mr. Justice FIELD, with whom concurred GRIER and MILLER, JJ., dissenting:

Unable to concur in the opinion of a majority of the court, which has just been read, I will proceed to give the grounds of my dissent.

The Supreme Court, by the Constitution, takes its appellate jurisdiction over cases "with such exceptions, and under such regulations as the Congress shall make." And the designation, by acts of Congress, of the cases to which this jurisdiction shall extend, has uniformly been held to be a legislative declaration that all other cases are excepted from it. Thus in *Wiscart* v. *Dauchy*,* which was decided as early as 1796, the court said, that if Congress had not provided any rule to regulate its proceedings on appeal, it could not exercise an appellate jurisdiction, and, if a rule were provided, the court could not depart from it. And, in *Clarke* v. *Bazadone*,† it was decided that a writ of error did not lie from this court to the General Court for the Territory northwest of the Ohio, because Congress had not by its legislation authorized such writ. It was urged, on the argument, that the judicial power under the Constitution extended to all cases arising under the Constitution and laws of the United States, and to controversies in which the United States were a party; and that the Supreme Court had appellate jurisdiction in all these cases, with such exceptions

* 3 Dallas, 327. † 1 Cranch, 212.

and under such regulations as Congress might make; that Congress had made no exception in that case, which was one arising under the laws of the United States, and no regulation was necessary to give the court the appellate power; that it derived that from the Constitution itself. But the court adhered to its previous ruling, although observing at the same time that from the manifest errors on the face of the record it felt every disposition to support the writ.

In *Durousseau* v. *The United States** the subject was again considered, and the court held, that though its appellate powers were given by the Constitution, they were limited and regulated by the judicial act and such other acts as had been passed on the subject. "When the first legislature of the Union," said Mr. Chief Justice Marshall, in delivering the opinion of the court, "proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and its affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it." And, in illustration of this principle, reference is made to the provision of the law which allows a writ of error to a judgment of the Circuit Court, where the matter in controversy exceeds the value of two thousand dollars. "There is no express declaration," said the chief justice, "that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value, and implies negative words."

* 6 Cranch, 307.

It follows, therefore, that the appellate jurisdiction of this court exists only in those cases, in which it is expressly granted. In conformity with this principle it has been held that such jurisdiction does not extend to final judgments in criminal cases, it not having been conferred by Congress. A question arising in a criminal case can only be brought before this court for decision upon a certificate of a division of opinion between the judges of the Circuit Court.* So, under the Judiciary Act of 1789, jurisdiction to review a judgment or decree of the Circuit Court, rendered in an action brought before it from the District Court *on writ of error*, was denied, as the act only mentioned judgments and decrees brought before the Circuit Court *on appeal* from the District Court.†

The act of July 1st, 1864, under which the Circuit Court acquired jurisdiction over this case, makes no provision for an appeal from the decree of the court, or for any re-examination of the decree by the Supreme Court. If an appeal exists it must be found in the amendatory Judicial Act of March 3d, 1803, or in the act of March 3d, 1851, to ascertain and settle private land claims in the State of California.

The Judiciary Act of 1789 only provides for a review upon *a writ of error* of the final judgments and decrees of the Circuit Court where the matter in dispute exceeds the sum or value of two thousand dollars. It is the act of 1803 which extends the appellate power of the court to a review of final judgments and decrees brought up *on appeal* when the matter in dispute is of the like amount or value; and it limits the review to judgments and decrees rendered in "cases of equity, of admiralty, and maritime jurisdiction, and of prize or no prize." Subsequent acts of Congress have reduced the required amount or value of the matter in dispute in some cases—as in suits for the protection of copyrights and patents; but in none of them is there any change in the character of the case in which the judgment or decree of the

* Forsyth v. The United States, 9 Howard, 571.

† United States v. Goodwin, 7 Cranch, 108.

Circuit Court can be reviewed on appeal. Where a review of the action of the Circuit Court upon any other matter is intended, it is authorized by special provision in the act creating the proceeding.

The question, then, upon the act of 1803 is, whether its terms embrace a proceeding taken for the ascertainment and settlement of a claim to land derived from the Spanish or Mexican governments? Such a proceeding is not a suit in admiralty, of course; nor is it a suit in equity, as those terms are there used. By those terms is meant a regular proceeding in a court of justice for relief on equitable grounds in contradistinction to an action at law for the enforcement of legal rights—a proceeding which can only be sustained when plain, adequate, and complete remedy cannot be had at law. The act mentions the pleadings by which the suit is to be conducted; it requires a transcript of the bill, answer, and deposition to be transmitted to the Supreme Court on appeal, clearly indicating the nature of the proceeding to which it refers. The proceeding for the confirmation of a California land claim is of a very different character; is governed by different principles, and supported by different evidence. It is a proceeding taken under a statute conferring a peculiar and limited jurisdiction, created for the purpose of enabling the government to separate private lands from the public domain, and to discharge its political obligations under the treaty of cession. It is in the nature of an inquisition of the government, invoked by the petition of the claimant, and governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of the former government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. Though the principles of equity are to constitute one ground of the decision, the proceeding has nothing in it whatever which will justify its designation as a suit in equity as those terms are used in the act of 1803.

The heads of the different departments are often required by acts or resolutions of Congress to settle claims for losses and liabilities incurred on behalf of the government, or in

the attempted performance of contracts on the principles of equity. Thus, in the case of De Groot, who asserted claims for furnishing materials for the Washington aqueduct, the resolution of Congress directed the Secretary of War to settle the claims "on the principles of justice and equity."* Yet, no one would pretend that the proceeding before the secretary was a suit in equity, as these terms are understood in a legal sense. Nor is an application for a patent, or a proceeding for the assessment of damages, where private property is taken for public purposes, a suit of that nature. Nor would such special proceeding lose its distinctive and special character if by an act of Congress it was made subject to review on appeal by the District Court of the United States. These cases belong to that class of controversies which are properly the subjects of administrative regulation, and do not become converted into suits in equity because judicial agency is brought in to aid the administrative proceeding. They may be submitted to the entire disposition of a board of commissioners without the violation of any principle, just as the California land cases are submitted in the first instance to such board for investigation.

The act of March 3d, 1851, does not provide for any consideration by the Circuit Court of cases of this character. The jurisdiction over these cases is by that act vested, in the first instance, in a board of commissioners, and afterwards, on appeal from the decision of the board, in the District Court. From the decrees of the District Court an appeal lies directly to the Supreme Court. The language of the act is, "that the District Court . . . . . shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States."

The act of July 1st, 1864, authorizes a transfer from the District Court to the Circuit Court of cases of this kind, where the district judge is interested in the land, the claim to which is pending before him, and also where the case affects the title to lands within the corporate limits of any

* 12 Stat. at Large, 874.

city or town; but it does not confer any right of appeal from the action of the Circuit Court in these cases after they are transferred. It is contended, however, by counsel, that the right of appeal goes with the transfer of the case.

The argument is, that there is no rule for the decision of the case after it is transferred, unless the provisions of the act of 1851 on this point are considered as governing; and that it is not to be presumed that Congress intended that the right of appeal from the decision should depend upon the contingency of the district judge having an interest in the claim, or the fact that some of the lands involved are situated within the limits of a corporate city.

The answer to the first head of the argument is found in the fact that the rules prescribed by the act of 1851 would govern, independent of their statutory enactment. Whether a title, alleged to have been acquired under the former government, was in fact thus acquired, and entitled to recognition after a change of sovereignty by the new government, would necessarily depend upon the laws, customs, and usages of the former government, the laws of nations, the stipulations of the treaty by which a change of jurisdiction was effected, and the considerations which should govern a just nation in treating of the property of its newly acquired subjects, as explained by the highest tribunal of the country.

And as to the second head of the argument, it may be suggested that it would be a reasonable position to assume that Congress, in passing the act in question, understood the meaning of the language it used, and recognized the difference between the District and Circuit Courts of the United States, and when it omitted to provide any appeal from the decree of the Circuit Court, it intended that none should exist. There is no repugnancy between the acts of 1851 and 1864. Reading them together, it would seem to be clear that Congress intended that when a case was decided by the District Court an appeal should lie; but when decided by the Circuit Court, its decision should be final. There is nothing singular in a provision of this kind, and if there

were, it is sufficient that such was the will of the legislature. In matters of survey, which oftentimes determine the value of the whole claim, the decision of the Circuit Court is admitted to be final, made so in express terms by the act. Is there any more reason for doubting the disposition of Congress to trust to that court the final settlement of the title, than there is to trust the final settlement of the boundaries of the land when the title is confirmed?

But it is not necessary to rest this matter upon reasons of this nature. The absence of a provision allowing an appeal was not an oversight on the part of Congress. It is evident, from the general language of the act, and the object sought to be accomplished by it, that it was the intention of the legislature to give finality to the action of the Circuit Court?

The act was designed, as its name purports, to *expedite* the settlement of titles to land in the State. Great delays and embarrassments were found to exist in determining the location and boundaries of tracts confirmed after the question of title had been adjudicated. The hearing by the District Court of exceptions to surveys returned by the surveyor-general, interposed by parties possessing or asserting adverse interests, the taking of depositions, the discussion of counsel, and the modifications or new surveys sometimes ordered, necessarily occupied the time usually taken by an ordinary suit at law. Then followed the right of appeal to the Supreme Court from the action of the District Court, not merely by the original contestants to the proceeding, but by third parties intervening, whether adjoining proprietors, purchasers under the original grantee, or persons claiming by pre-emption, settlement, or other right under the United States. To obviate the delays and expense necessarily attending proceedings of this character, particularly as occasioned by the appeal to the Supreme Court, and to relieve that tribunal, burdened by a crowded docket, the act limited its jurisdiction to cases in which appeals were then pending, and vested jurisdiction in the Circuit Court, over cases in which appeals might be subsequently taken

When from the decree of the District Court, approving or correcting the survey, no appeal had been taken, "no appeal," says the act, "to that court shall be allowed, but an appeal may be taken, within twelve months after this act shall take effect, to the Circuit Court of the United States for California, and said court shall proceed to fully determine the matter."

Following these provisions is the section which directs that when the district judge is interested in any land, the claim to which, under the act of March 3d, 1851, is pending before him on appeal from the board of commissioners, the case shall be transferred to the Circuit Court, "which shall thereupon take jurisdiction and determine the same." The act then proceeds as follows: "The said District Courts may also order a transfer to the said Circuit Court of any other cases arising under said act, pending before them, affecting the title to lands within the corporate limits of any city or town, and in such cases both the district and circuit judges may sit."

The answer to the last objection will be more obvious if reference is made to the circumstances under which the act of 1864 was passed, as given in the opinion of the Circuit Court. These circumstances are not referred to for the purpose of controlling the construction of the language of the act, but in answer to suppositions as to the intention of Congress.

At the passage of the act there were only two cases pending in the District Courts of California, with reference to which the authority conferred by the clause in question could be exercised,—the case of the City of San Francisco, and the case of the City of Sonoma, both against the United States. The first case had then been pending in the District Court for over eight years. In the mean time the city had extended in all directions, and interests of vast magnitude had grown up, which demanded that the title to the land upon which the city rested should be, in some way, speedily and finally settled. The land commissioners had adjudged that the claim of the city was valid within certain described

limits. The United States, through their highest legal officer, had assented to this adjudication, and the principal question on appeal before the District Court was as to the additional quantity claimed over the quantity confirmed.

The case of the City of Sonoma had been likewise pending in the District Court on appeal for over eight years. In this case the United States had, through the attorney-general, signified their assent to a confirmation of the decree of the board, and the principal question on appeal here was also as to the additional quantity claimed by the city.

It was under these circumstances that the law was passed authorizing a transfer of these cases to the Circuit Court. If an appeal from its action had been intended, no beneficial object would have been accomplished by the transfer, for the same delay would follow an appeal from the Circuit Court as would follow an appeal from the District Court. Nor can any reason, in that view, be assigned for allowing both the district and circuit judges, if they desired, to sit in the hearing of these cases.

The acts of 1792, 1809, and 1821, which authorize a transfer of causes from the District Court to the Circuit Court, where the district judge is interested, or has been counsel in the case, or is disabled from performing the duties of his office, or is related to either of the parties, have no bearing upon the question under consideration. They do not confer any right of appeal from the action of the Circuit Court after the cases are transferred, or any right to have such action reviewed on writ of error. Such right, when it exists, depends upon the acts of 1789 and 1803; that is, upon the nature of the case and the amount or value of the matter in controversy; and the latter act, which is the only one relating to appeals, does not cover, as I have endeavored to show, a decree in a proceeding for the settlement of a California land claim, where the right or title is alleged to have been derived from the Spanish or Mexican governments.

NOTE.

For a short time it seemed possible that the present case might assume an interest beyond that of the point of law involved. The decree of the Cir-

Note.

cuit Court from which an appeal was prayed, and which was made May 18th, 1865, was one settling the title to a large part of the city of San Francisco; how considerable will be seen from the decree itself, of which the following is the material portion:

"The land of which confirmation is made, is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the 7th of July, A.D. 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the Bay of San Francisco; on the west by the Pacific Ocean; and on the south by a due east and west line, drawn so as to include the area aforesaid, subject to the following deductions, namely: such parcels of land as have been heretofore reserved or dedicated to public uses by the United States; and, also, such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. This confirmation is in trust, for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the city."

However, immediately after the expression of the views of the majority of the judges, as given in the preceding case, Congress passed the following act:

An act to quiet the title to certain lands within the corporate limits of the City of San Francisco.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all the right and title of the United States to the land situated within the corporate limits of the city of San Francisco, in the State of California, confirmed to the city of San Francisco by the decree of the Circuit Court of the United States for the Northern District of California, entered on the 18th day of May, 1865, be and the same are hereby relinquished and granted to the said city of San Francisco and its successors, and the claim of the said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely: that all the said land, not heretofore granted to said city, shall be disposed of and conveyed by said city to parties in the *bonâ fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the State of California may prescribe; except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses. *Provided, however*, That the relinquishment and grant, by this act, shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, whether derived from Spain, Mexico, or the United States, or preclude a judicial examination and adjustment thereof.

Approved, March 8, 1866.

MERRIAM v. HAAS.

A motion to dismiss an appeal in a decree of foreclosure, in chancery, refused, though the complainant below, appellant here, had, after his appeal made, issued execution and got the amount for which the decree he appealed from, was given.

MERRIAM filed his *bill in equity* in the Federal court for Minnesota, for the foreclosure of a mortgage executed by Haas and wife for $6000, with interest at 15 per cent.

The defendants answered, admitting the execution of the mortgage, and that $4000 and interest (parcel of the amount so secured) was due; and they submitted to a decree for that sum. But as to the residue ($2000 and interest) they insisted that they never owed it, because, they alleged, they had only received from Merriam the sum of $4000, and not the sum of $6000 as was agreed, and on the faith of which agreement the mortgage had been executed.

In June, 1861, the court gave a decree for $4000, with interest and costs; the whole amounting to $5271, but refused to give a decree including the $2000 disputed. In April, 1862, the complainant appealed. On the 15th November, of the same year, that is to say, *after the appeal*, there was a sale and report of the master in execution of the decree; and on the following November, that, to wit, of 1863 (the sale not being yet confirmed), the defendant paid into court the amount for which the decree was given, with interest; which whole sum the complainant received and gave his receipt for. The case being now here, *Mr. Carlisle moved to dismiss the appeal*, "for that after the same was prayed by these appellants and allowed by the court, the decree below having been in their favor for $5271, interest and costs, but having denied them an additional sum which they had claimed in their bill, the said appellants by their voluntary act as appears by the record, enforced and took advantage of the said decree, and accepted and received the sum thereby awarded

to them; whereby they waived their appeal, and are estopped to question the said decree in this court.

"On consideration," &c.

"MOTION OVERRULED."

NOTE.

This motion was decided in February, 1864, about a month before the present reporter was appointed, and is reported now by him from the records only. The decision, to which MILLER, J., referred counsel, from the bench, was much relied on by the attorney-general, in argument, in the next case; on which account specially the reporter presents the matter; though, of necessity, in an imperfect way. It may be added, that the case coming on finally to be heard on its merits, the decree below was reversed: and the case remanded, with directions to enter a decree which should give the complainant the whole $6000 claimed by him.

UNITED STATES v. DASHIEL.

1. Where a writ of error is taken to this court by a plaintiff below, who previously to taking the writ issues execution below and gets a partial but not a complete satisfaction on his judgment, the writ will not, in consequence of such execution merely, be dismissed.
2. Levy of an execution, even if made on personal property sufficient to satisfy the execution, is not satisfaction of the judgment, and, accordingly, therefore, does not extinguish it if the levy have been abandoned at the request of the debtor and for his advantage; as *ex. gr.* the better to enable him to find purchasers for his property.

THE United States brought suit at *common law*—"debt on bond"—for $20,085.74 against Major Dashiel, a paymaster in the army of the United States, and his sureties. Dashiel denied every part of the demand, but claimed specially a deduction of $13,000 from the sum sued for, on the ground that while travelling in remote regions of Florida, where he was going with the whole sum in gold coin to pay the army, he had, without the least want of care on his part, been robbed of about $16,000; as was proved among other ways by the fact that a portion of the money, $3000, easily iden-

tified, was discovered among negro slaves of the neighborhood, and got back.

The jury under a charge from the court made allowance for the part of which Major Dashiel alleged that he had been robbed; and found for the United States for a portion only of the sum claimed, to wit, $10,318.22. Judgment was entered accordingly. Not being satisfied with judgment for this amount, the United States, on the 1st September, 1860, took a writ of error to this court. Dashiel had also excepted. On the 15th April, 1860, however—before the government had thus taken its writ of error—*it sued out execution*, and, Major Dashiel having waived advertisement, levied on a large amount of real estate and *on eight slaves*. A portion of the real estate was sold June 5th, 1860; $5275 having been got for it. The sale was then adjourned.

The only evidence as to what led to an adjournment of the sale appeared in a letter from the deputy marshal who superintended it to the acting marshal, his principal, sent up in the record, which came up on *certiorari* for diminution after the writ of error was taken out. In regard to this, the record, or amended record as it may be called, after setting out the execution, levy, and return, thus in substance ran:

"Accompanying said return and inclosed with the execution, *whether as part of the return or explanatory of the same*, as made a part of the record, is the following letter, in words, to wit:

SAN ANTONIO, TEXAS, June 7th, 1860.

To W. MASTERSON, ESQ.,
Acting United States Marshal, Austin.

DEAR SIR: Your note of the 4th June came to hand yesterday. You learned by my note of the 5th that *I* had adjourned the sale, after the bids amounted to $5275, *as directed* by *your* note of the 2d. I now act upon your note of the 4th, received yesterday, and return, as you directed, the execution. I think the attorney will certainly approve of *your* action in staying the sale on the bids reaching $5000; and I cannot but think that he will, upon seeing *the abundance of the levy*, and learning that there is *no hindrances* thrown in the way of a forced collection, but *a modest*

petition for time the better to enable the defendant to find purchasers for his property, now in the clasp of the law. The *sympathies of this community* for Major Dashiel, where he has long lived, with his family, *all plead for extension of time*, if possible, to the next January Term of the honorable District Court. The interest still accruing, would the United States be much injured by the extension?

Yours, respectfully,

S. NEWTON."

Mr. Paschall, for Dashiel, defendant in error, now moved to dismiss the writ of error; the ground assigned in the motion having been that after judgment rendered "there was an execution sued out by the plaintiff, a levy, and sale, and satisfaction."

In favor of the motion he argued:

I. It is an old rule of the law, one not departed from either in modern times, that a levy on sufficient personal property operates, generally speaking, as an extinguishment of a judgment. So far back as Queen Elizabeth's time, Croke gives us the case of *Mountney* v. *Andrews*,* where it is said, that "to a *scire facias* on a judgment the defendant may plead execution on a *fi. fa.* for the same debt, *without showing that the writ is returned*;" implying, of course, that the levy was satisfaction. Lord Raymond, in a later day (Queen Anne's), gives us *Clerk* v. *Withers*,† in which the marginal abstract is this: "When the defendant's goods are seized on a *fi. fa.* the debt is *discharged*." Nor is this ancient English law alone. It has been nowhere so explicitly declared, or so far carried out, as in the United States. "When an officer, under an execution, has once levied upon the property of the defendant sufficient to satisfy the execution," says the Supreme Court of New York, A.D. 1815,‡ "he cannot make a second levy. *This* principle appears to be *well* settled." Indeed, as that court remarks in the case cited, it had been previously held in New York,§ that a sheriff could

* Croke Eliz. 237. † Page, 1072; S. C. 1 Salkeld, 322.
‡ Hoyt v. Hudson, 12 Johnson, 208.
§ Reed v. Pruyn, 7 Id. 428

not take security on a *fi. fa.*, and still hold the execution in his hand, using it afterwards to enforce payment; and they say, "According to the principle here recognized, it was immaterial whether the property first levied on was sufficient to satisfy the execution or not." In 1825, we have in the same Supreme Court the case of *Ex parte Lawrence*,* where the abstract is—"A levy on personal property sufficient to satisfy a *fi. fa.*, is an extinguishment of the judgment on which it issued." "This," say the court there, "has been *often* held;" and they declared that the judgment therefore ceased by such levy to be a lien on real estate which it previously bound. Numerous other New York cases may be referred to for the same law;† if, indeed, after a matter has been once solemnly adjudged, it is respectful to refer to cases affirming it with each reverting term.

In New England, the great name of Chief Justice Parsons, delivering the opinion of his court, sanctions the same position.‡ He says:

"When goods sufficient to satisfy an execution are seized on *fi. fa.*, the debtor is discharged, even though the sheriff waste the goods or misapply the money arising from the sale, or does not return his execution; for by a lawful seizure the debtor has lost his property in the goods."

And these principles of law, found alike in England and in our older States, were early adopted, and are completely encysted in the jurisprudence of Texas, from which this case comes. There, as elsewhere, the courts declare, that *primâ facie* a levy of goods, if valid and on property sufficient, is "satisfaction."§

There is really no authoritative case contrary to these decisions about the effect of a levy, though there are extrajudicial *dicta*, and some head-notes reporting them, and

* 4 Cowen, 417.

† Jackson v. Bowen, 7 Cowen, 13; Wood v. Torrey, 6 Wendell, 562; Shepard v. Rowe, 14 Id. 262.

‡ Ladd v. Blunt, 4 Massachusetts, 402

§ Bryan v. Bridge, 10 Texas, 151.

giving *dicta* rather than points adjudged, which might lead to a conclusion that there was. Thus in *Green* v. *Burke*, in New York, A.D. 1840,* it is said in the syllabus:

"A levy by virtue of an execution is not *always* a satisfaction of the judgment; though the property levied on be of sufficient value to satisfy the execution, and the defendant be not guilty of eloignment. It is only satisfaction *submodo*. If the levy fail to produce satisfaction in fact without any fault of the plaintiff, he may proceed to obtain execution."

But, without affirming or denying what is here said, it is enough to remark that the case itself was one where the so-called "levy" was made by a constable who was a *minor*, and who had abandoned the levy to relieve himself from the consequence of assuming the duties of the office within age—an office which it was a fraud in him to attempt to fill. It was held, and rightly of course, that *such* a levy—no levy whatever—was not a satisfaction.

So, in *The People* v. *Hopsen*,† Bronson, C. J., says:

"If the broad ground has not yet been taken, it is time it should be asserted that a mere levy upon sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. There is no foundation in reason for a different rule. . . . *It often happens that a levy is overreached by some other lien, is abandoned for the benefit of the debtor, or defeated by his misconduct. In such cases there is no color for saying that the judgment is gone; and yet they are included in the notion that a levy satisfies the debt.* . . . The true rule I take to be this, that the judgment is satisfied when the execution has been so issued as to change the title, or in some way deprive the debtor of his property."

If Bronson, C. J., meant only to say that the presumption of satisfaction from a levy on sufficient property, was not one *juris et de jure*—one not incapable of being rebutted—a rule which had certain exceptions—as the italicized portion of his remarks might lead us to suppose he did mean—there

* 23 Wendell, 490. † 1 Denio, 578.

is nothing to be denied by us. If, however, he meant to say that the rule established by his predecessors, in his own court, in its best days, had "no foundation in reason,"—a meaning difficult, with proper respect to him, to suppose—then we may observe, as the fact is, and as he himself declares* it was, that his remarks on this subject were not necessary to the decision; and were made only at the wish of counsel; and, we may observe also, that they are put by the reporter as *dicta* simply "per Bronson, C. J.;" impertinent really to the case. What *he*, Bronson, C. J., under these circumstances "took to be the true rule" is not vastly important in considering what the rule is as established by judicial precedents.

It must be observed that neither this case where Bronson, C. J., thus speaks, nor *Green* v. *Burke* before it, where we have extracted the loose syllabus, were cases at all concerning writs of error, or of motions to dismiss or quash them.

Will the doctrine, declared in the New York case of *Ostrander* v. *Walter*,† and recognized in some few others,‡ be set up as a reply?—"that where an execution has been levied upon property of the defendant, and abandoned by his request and for his benefit, this will not amount to a satisfaction of the judgment?" If it is, the answer is that the rule does not apply to any facts of this case. Assuming—what is not true in law—that the *letter* of the deputy marshal was a part of the marshal's "return" to his execution, yet it is plain that the sale was stayed by the deputy in consequence of an order from the marshal. "I had adjourned the sale," he writes, "as directed by *your* note of the 2d." "I think the attorney will certainly approve *your* action in staying the sale," &c. There were "no hindrances" thrown in the way by Major Dashiel. He had forwarded a sale by waiving advertisement; and even the "modest petition" seems to have come from others rather than from himself. It was "the

* Page 577. † 2 Hill, 329.

‡ Porter v. Boone, 1 Watts & Sergeant, 251; Walker v. Bradley, 2 Arkansas, 595.

sympathies of the community," where he had long lived and all his family, which pleaded "for an extension" of time: not himself.

In this state of facts it is not necessary to consider what is the effect of a surrender made in consequence of a debtor's request when the creditor has his hand full of property. A striking effect of such an act may be seen in *Magniac* v. *Thomson*,* where the act, done clearly for the debtor's benefit, cost the creditor $80,000. Creditors who have pushed their debtors to the wall with all the sharp instruments of the law must be careful what they do. In seizing a man's property and putting it under a sheriff's wand, they do an extreme act. They can, indeed, have satisfaction if they will pursue such odious measures. But if they become compunctious and alarmed, and afraid to go to the *ultima ratio* of the law, and sell, they throw their chance away. That is their affair: and they had better have thought of it before they made the levy. If a creditor, with his eyes open, were at his debtor's request and for his debtor's benefit deliberately to enter satisfaction of record, who doubts that his writ of error would be gone? If having a levy, from which, as in this case, the whole debt could have been obtained, he abandons it, wherein differs the case? But this is useless discussion; for there is no evidence that Dashiel asked anything.

Will it be said again that the rule does not apply to a levy made on land? Granted. But here the levy was on slaves; chattels as our laws then stood.

Or that the rule has several exceptions? Granted again. But unless you show that they apply to us, of what pertinence is the argument?

Or will it be said that there is no evidence that the levy was sufficient? The answer is twofold; first of law and second of fact. Of law, in that the presumption of law is, when a levy is made, on goods, that the goods are sufficient to satisfy the levy. In *Bryan* v. *Bridge*,† as here, a levy had

* 2 Wallace, Jr., 209.

† 10 Texas, 153.

been made on slaves. The court say: "If the levy had been valid the plaintiffs in the execution could have had no other until it had *been shown* that the levy so first made was not sufficient. *Primâ facie, it* was *sufficient.*" In our case without doubt the levy was, in fact, sufficient. The letter of the deputy marshal shows it. He speaks of "the abundance" of the levy. The property was large.

We have then these general rules: (i) that a levy on sufficient personal property is satisfaction; and (ii) that the *primâ facie* presumption is that any levy on personal property is on sufficient property.

But if a judgment is satisfied, how can error lie on it? "When a party," says an eminent Missouri judge, delivering the opinion of the Supreme Court of that State,* "voluntarily extinguishes his own judgment, he cannot afterwards complain of it. He is under no necessity of suing out execution to enforce his judgment and receive satisfaction of it; and if by his own voluntary act he extinguishes his judgment, what is there on which a writ of error can operate?"

In Pennsylvania, also, the doctrine so forcibly above expressed was acknowledged and acted on by its Supreme Court, Gibson, C. J., being then at the head of it. A motion was made there in *Laughlin* v. *Peebles*† to quash a writ of error; various reasons were put forward why the writ should be quashed: among them that the plaintiff had in some way received the benefit of his judgment. This was enough: and the reporter says:

"The court being satisfied from the evidence exhibited that the plaintiff had received the benefit of his judgment, on this ground *alone*, quashed the writ of error."

II. Independently of this ground of satisfaction of the debt and extinction of the base of error, comes the settled and here kindred rule about election. A party having several remedies must elect. On this principle it is, rather

* Scott, J., in Cassell v. Fagin, 11 Missouri, 902.

† 1 Pennsylvania, 115.

perhaps than on the other, that proceeds the case of *Hall* v. *Hrabrowski* in the Supreme Court of Alabama.* The syllabus of the case is:

"Where a plaintiff who had obtained judgment below, sued out a writ of error to this court to reverse it, and whilst the cause was pending here, sued out execution on his judgment and collected the money, and the fact not being brought to the notice of this court until after its judgment had been pronounced, reversing and remanding the cause, an order was made directing that the certificate of this court should not issue, until the debt, interest, and costs below were refunded to the defendant."

The court in giving its opinion says:

"If the motion had been made before judgment was rendered in this court we would have directed a stay of all proceedings; it being obviously unjust that the plaintiff should collect the amount of his judgment which he is complaining of as erroneous, and *in which he may on another trial fail to recover anything.* It is both vexatious and oppressive in the plaintiff to prosecute a suit here to reverse a judgment the correctness of which he impliedly affirms by coercing payment from the defendant under it."

The observations of the court above italicized have particular force in this case, for Dashiel denied the whole claim; both parties excepted; and on a second trial the government may get nothing.

Indeed, in thus applying this rule of election—the rule, that where a party has two remedies, and exhausts one, he shall not afterwards invoke the other—we do but carry out principles that exist in analogous matters. Thus, a defendant cannot have a writ of error after *auditâ querelâ.*† So, where a party had *agreed* that he would not prosecute a writ of error, he cannot afterwards be allowed to do so, but is estopped.‡ So, where he voluntarily elected to take a nonsuit, he cannot have a writ of error.§

* 9 Alabama, 278; and see Bradford v. Bush, 10 Id. 274.

† Brooks v. Hunt, 17 Johnson, 486.

‡ Executors of Wright v. Smith, 1 Term, 388-9.

§ Kent v. Hunter, 9 Georgia, 207.

The fact that our suit was one at common law will be noted. In cases in chancery there may be many appeals; appeals coming from different parts of it. *Blossom* v. *Railroad Company*,* illustrates our idea; and it is this which renders *Merriam* v. *Haas*, reported just before this case, no precedent in it. That was a case in chancery; a bill to foreclose a mortgage; nor was there any *execution levied.*

Mr. Speed, A. G., contra; citing and relying on *Merriam* v. *Haas.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Defendants move to dismiss the case because it appears by the record, as they allege in the motion, that the judgment in the court below was in favor of the plaintiffs, and, that before suing out the writ of error, they obtained satisfaction of the judgment "by execution and sale."

1. Principal defendant had been a paymaster in the army of the United States, and the record shows that the suit was commenced against him and the other defendant, as one of his sureties on the official bond of the former, given for the faithful discharge of his duties. Breach of the bond as assigned in the declaration was that the principal obligor failed to pay over, or account for the sum of twenty thousand and eighty-five dollars and seventy-four cents of the public moneys intrusted to his keeping, and for which he and his sureties were jointly and severally liable.

2. Claim of the plaintiffs was for that sum, as shown in the treasury transcript, but the defendants in their answer denied the whole claim, and they also pleaded specially that the principal obligor was entitled to a credit of thirteen thousand dollars, because, as they alleged, he was robbed, without any negligence or fault on his part, of that amount of the moneys so intrusted to his custody, during the period covered by the declaration. Verdict was for the plaintiffs

* 1 Wallace, 657.

for the sum of ten thousand three hundred and eighteen dollars and twenty-two cents, and on the eighteenth day of January, 1860, judgment was entered on the verdict. Both parties excepted, during the trial, to the rulings and instructions of the court, and the record shows that their respective exceptions were duly allowed.

3. Execution was issued on the judgment on the fifteenth day of April, in the same year, and the return of the marshal shows that on the twenty-eighth day of the same month he seized certain real property and slaves sufficient in all to satisfy the judgment. Formality of an advertisement, prior to sale, was omitted by the marshal at the request of the principal defendant, and on the fifth day of June following, the marshal sold certain parcels of the real property at public auction, amounting in the whole to the sum of five thousand two hundred and seventy-five dollars, as appears by his return. Nearly half the amount of the judgment was in that manner satisfied, but the clear inference from the return of the marshal, and the accompanying exhibit, is that the sale was suspended and discontinued at the request of the principal defendant and for his benefit. Request for the postponement of the sale came from him, and it was granted by the marshal, as stated in the record, the better to enable the defendant to find purchasers for his property. Writ of error was sued out by plaintiffs on the first day of September, 1860, and was duly entered here at the term next succeeding, and since that time the case has been pending in this court.

4. Motion to dismiss is grounded solely upon the alleged fact that the judgment was satisfied before the writ of error was sued out and prosecuted. Matters of fact alleged in a motion to dismiss, if controverted, must be determined by the court. Actual satisfaction beyond the amount specified in the return of the marshal cannot be pretended, but the theory is, that the levy of the execution in the manner stated affords conclusive evidence that the whole amount was paid, and it must be admitted that one or two of the decided cases referred to appear to give some countenance to that view of

the law; that is, they assert the general doctrine that the levy of an execution on personal property sufficient to satisfy the execution, operates *per se* as an extinguishment of the judgment.* None of those cases, however, afford any support to the theory that any such effect will flow from the issuing of an execution, and the levying of the same upon land. On the contrary, the rule is well settled that in the latter case no such presumption arises, because the judgment debtor sustains no loss by the mere levy of the execution, and the creditor gains nothing beyond what he already had by the lien of his judgment.† Reason given for the distinction is that the land in the case supposed remains in the possession of the defendant, and he continues to receive and enjoy the rents and profits.‡ Many qualifications also exist to the general rule as applied to the levy of an execution upon the goods of the judgment debtor, as might be illustrated and enforced by numerous decided cases. Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, it is doubtless true, that if the marshal or sheriff wastes the goods, or they are lost or destroyed by the negligence or fault of the officer, or if he misapplies the proceeds of the sale, or retains the goods and does not return the execution, the debtor is discharged; but if the levy is overreached by a prior lien, or is abandoned at the request of the debtor or for his benefit, or is defeated by his misconduct, the levy is not a satisfaction of the judgment.§ Rightly understood, the presumption is only a *primâ facie* one in any case, and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal

* Mountney v. Andrews, Croke Eliz. 287; Clerk v. Withers, 1 Salkeld, 322; Ladd v. Blunt, 4 Massachusetts, 403; Ex parte Lawrence, 4 Cowen, 417.

† Shepard v. Rowe, 14 Wendell, 260; Taylor v. Ranney, 4 Hill, 621.

‡ Reynolds v. Rogers, 5 Ohio, 174.

§ Green v. Burke, 23 Wendell, 501; Ostrander v. Walter, 2 Hill, 329; People v. Hopson, 1 Denio, 578.

measures which the creditor has pursued, the debt, says Bronson, C. J., is gone, although the creditor may not have been paid. Under those circumstances the creditor must take his remedy against the officer, and if there be no such remedy he must bear the loss.*

Tested by these rules, and in the light of these authorities, it is very clear that the theory of fact assumed in the motion cannot be sustained. Satisfaction of the judgment beyond the amount specified in the return of the marshal is not only not proved, but the allegation is disproved by the amended record.

5. Amended record undoubtedly shows that an execution was issued on the judgment, and that the same was partially satisfied before the writ of error in this case was prosecuted: but the defendants scarcely venture to contend that a partial satisfaction of the judgment before the writ of error is sued out, is a bar to the writ of error, or that it can be quashed or dismissed for any such reason. Doubt may have existed upon that subject in the early history of the common law; but if so, it was entirely removed by the elaborate judgment of Lord C. J. Willes, in the case of *Meriton* v. *Stevens*,† which is most emphatically indorsed in a well-considered opinion of this court. Nothing is better settled at the common law, says Mr. Justice Story, in the case of *Boyle* v. *Zacharie et al.*,‡ than the doctrine that a supersedeas, in order to stay proceedings on an execution, must come before there is a levy made under the execution; for if it come afterwards, the sheriff is at liberty to proceed, upon a writ of *venditioni exponas*, to sell the goods.

Form of the supersedeas at common law was "that if the judgment be not executed before the receipt of the supersedeas, the sheriff is to stay from executing any process of execution until the writ of error is determined." Settled construction of that order was, "that if the execution be begun before a writ of error or supersedeas is delivered, the

* Taylor v. Ranney, 4 Hill, 621.

† Willes, 272

‡ 6 Peters, 659.

sheriff ought to proceed to complete the execution so far as he has gone." Directions in the leading case were accordingly that the sheriff should proceed to the sale of the goods he had already levied, and that he should return the money into court to abide the event of the writ of error.*

6. Effect of a writ of error under the twenty-second section of the Judiciary Act, is substantially the same as that of the writ of error at common law, and the practice and course of proceedings in the appellate tribunals are the same except so far as they have been modified by acts of Congress, or by the rules and decisions of this court. Service of a writ of error, in the practice of this court, is the lodging of a copy of the same in the clerk's office where the record remains.† Whenever a defendant sues out a writ of error, and he desires that it may operate as a supersedeas, he is required to do two things, and if either is omitted, he fails to accomplish his object: 1, he must serve the writ of error as aforesaid, within ten days, "Sundays exclusive," after the rendition of the judgment; and 2, he must give bond with sureties to the satisfaction of the court, for the benefit of the plaintiff, in a sum sufficient to secure the whole judgment in case it be affirmed.‡ Security for costs only is required of the defendant when the writ of error sued out by him does not stay the execution, and he is not compelled, in any case, to make the writ of error a supersedeas, although it may be sued out within ten days after the judgment.§

Plaintiff also may bring error to reverse his own judgment, where injustice has been done him, or where it is for a less sum than he claims; but he, like the defendant, is required to give bond to answer for costs.‖ Writs of error at common law, whether sued out by plaintiff or defendant, operated in all cases as a supersedeas; but it has never been heard in a court of justice since the decision in the case of

* Meriton v. Stevens, Willes, 282.

† Brooks v. Norris, 11 Howard, 204.

‡ Catlett v. Brodie, 9 Wheaton, 553; Stafford v. Union Bank, 16 Howard, 135. § 1 Stat. at Large, 404.

‖ Johnson v. Jebb, 3 Burrow, 1772; Sarles v. Hyatt, 1 Cowen, 254.

Meriton v. *Stevens*, that they had any retroactive effect, or any effect at all, until they were allowed and served.

Applying these rules to the present case, it is clear that there was no conflict between the action of the marshal in obtaining partial satisfaction of the judgment in this case, and the pending writ of error which was subsequently sued out and allowed. Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not, and never was a bar to a writ of error, where it appeared that the levy was made, or the payment was received prior to the service of the writ, and there is no well-considered case which affords the slightest support to any such proposition. Subsequent payment, unless in full, would have no greater effect; but it is unnecessary to examine that point, as no such question is presented for decision. Where the alleged satisfaction is not in full, and was obtained prior to the allowance of the writ of error, the authorities are unanimous that it does not impair the right of the plaintiff to prosecute the writ, and it is only necessary to refer to a standard writer upon the subject to show that the rule as here stated has prevailed in the parent country from a very early period in the history of her jurisprudence to the present time.*

Substance of the rule as there laid down is, that where the execution is issued before the writ of error is sued out, if the sheriff has commenced to levy under the execution, he must proceed to complete what he has begun; but if when notified of the writ of error he has not commenced to levy, he cannot obey the command of the execution.† Even the levy of the execution after the supersedeas has commenced to operate, is no bar to the writ of error; but the court, on due application, will enjoin the proceedings and set the execution aside, and it has been held that the sheriff and all the parties acting in the matter, are liable in trespass.‡

* 1 Chitty's Archbold's Practice, 558 (ed. 1862).

† 2 Williams's Saunders, 101, b.; Perkins v. Woolaston, 1 Salkeld, 321; Milstead v. Coppard, 5 Term, 272; Kennaird v. Lyall, 7 East, 296; Belshaw v. Marshall, 4 Barnewall & Adolphus, 836; Messiter v. Dinely, 4 Taunt. 280

‡ 2 Williams's Saunders, 101, g.; 3 Bacon's Abridgment, Error, H.; Dudley v. Stokes, 2 W. Blackstone, 1188.

Neither the decisions of the courts, therefore, nor text writers, afford any countenance to the theory that partial satisfaction of the execution operates as an extinguishment of the judgment, or a release of errors, or that it takes away or impairs the jurisdiction of this court. Carefully examined it will be found that the cases cited assert no such doctrine, but that every one of them proceeds upon the ground that where the plaintiff has sued out execution, enforced his judgment, and obtained full satisfaction, there is nothing left on which a writ of error can operate.

Import of the argument is, that a writ of error lies only on a final judgment, and that the plaintiff, when he accepts full satisfaction for his judgment, removes the only foundation on which the writ of error can be allowed. Suffice it to say, in answer to that suggestion, that no such question arises in the case, which is all that it is necessary to say upon that subject at the present time.

The motion to dismiss is DENIED.

Mr. Justice GRIER (with whom concurred NELSON and SWAYNE, JJ.), dissenting:

I think this writ of error ought to be dismissed. The plaintiff having elected to take execution and satisfy his judgment, has no longer any judgment upon which the writ can operate. His election to accept and execute his judgment below is a *retraxit* of his writ of error. Such has been the unanimous decision of every court of law that has passed on the question. Appeals in chancery can furnish no precedent for a contrary decision. A decree in chancery may have a dozen different parts, some of which may stand good and be executed, while others may be litigated on appeal. A judgment at law is one thing. The plaintiff cannot divide his claim into parts, and when he obtains judgment for part, accept that part, and prosecute his suit for more. Having a right to elect to pursue his judgment or his writ of error he cannot elect to have both.

MINNESOTA COMPANY v. CHAMBERLAIN.

GRAHAM & SCOTT v. SAME, IMPLEADED WITH LA CROSSE RAILROAD COMPANY.

The language of a decree in chancery must be construed in reference to the issue which is put forward by the prayer for relief and other pleadings, and which these show it was meant to decide. Hence, though the language of the decree be very broad and emphatic,—enough so, perhaps, when taken in the abstract merely, to include the decision of questions between codefendants,—yet where the pleadings, including the prayer for relief, are not framed in the way usual in equity when it is meant to bring the respective claims and rights of codefendants before the court, but are framed as in a controversy between the complainant and defendant chiefly or only—such general language will be held down to these two principal parties alone.

THESE were appeals from decrees of the Circuit Court for Wisconsin, sustaining demurrers to two bills of complaint. Both bills and the essential question in each were the same; certain small differences between the bills being noted further on. The case was this:

In September, 1857, the La Crosse and Milwaukie Railroad Company, a company organized to build a railroad from Milwaukie to La Crosse, across the State of Wisconsin, but whose road was not then completed, entered into articles of agreement with *Chamberlain*, for the double purpose of insuring the completion of the road and securing to him a large debt, alleged to be due from the company. By this contract the road was leased to Chamberlain, in consideration that he would apply the income to the working and extension of the road, to the payment of interest on debts of the company, and to the payment of Chamberlain's own debt, on satisfaction of which, either by application of the income or otherwise, the road was to be restored to the company. After the execution of this contract, and in the following month, the company confessed a judgment in his favor for $629,089.72. Afterwards, and in the same month,

Cleveland obtained a judgment against the company for $111,700.71.

To enforce the satisfaction of this judgment, by sale of the road and other property of the La Crosse Company, as for brevity the corporation was usually styled, Cleveland filed his bill in the District Court of the United States for the District of Wisconsin, against that company and Chamberlain, with whom were joined some other defendants.

In this bill, according to the account given of it by the complainants in the present cases, Cleveland insisted that the lease to Chamberlain and the judgment confessed in his favor were without consideration and in fraud of creditors, and that they hindered the collection of his judgment, and he prayed that they might be declared void. The La Crosse Company and Chamberlain answered, denying all fraud, and Cleveland took issue by replication.

The court found against the respondents, and at January Term, 1859, decreed that the articles of agreement between the La Crosse Company and Chamberlain "be and hereby are *vacated, annulled*, and made *void*, so that the same shall not be of *any force and effect whatever*," and that "the judgment and all executions and proceedings thereon be and hereby are *vacated, annulled, made void*, and *set aside*, so that the same shall have *no effect whatever*." The decree also "perpetually enjoined and restrained" Chamberlain from "controlling or meddling with the railroad or anything belonging to it under the articles of agreement."

In 1860, a company—called for brevity the Minnesota Company—succeeded, through a purchase, and through a subsequent organization, such as is allowed by the statutes of Wisconsin, as a railroad company, in order to take and manage the property acquired by the purchase, to all the property, franchises, and rights of the La Crosse Company; subject, however, to prior incumbrances.

This Minnesota Company being thus interested in the matter, alleged by their bill below (the first of the two cases now under review), that by this decree the agreement and the

confessed judgment were made absolutely void, not only against *Cleveland*, the judgment creditor, but *also as between Chamberlain and the La Crosse Company*, and that Chamberlain, notwithstanding this decree, having purchased the Cleveland judgment, remained in possession of the road, receiving large sums of money, amounting altogether to more than $200,000, for which he was bound to account. They prayed, therefore, that Chamberlain might be ordered to apply to the payment of the Cleveland judgment, from the money so received, a sum sufficient for that purpose; that he might be ordered to account; that he might be credited with the sum applied to the Cleveland judgment; that the balance be ascertained; that the Cleveland judgment be ordered to be cancelled; and that the ascertained balance, if against Chamberlain, be paid to the Minnesota Company, or, if in his favor, by the Minnesota Company to him. They also prayed further relief.

The bill of Scott & Graham—the second of the two bills below and now here for review—was, as already signified, essentially like the first, that of the Minnesota Company. Like it, it did not seek specifically to set aside Chamberlain's lease; but while prominently making its alleged fraudulent nature inducement in this case, went on the assumption that the lease and judgment were already vacated as to everybody and for all purposes by the decree of January, 1859. The bill, however, in this second case, did allege, also, that the lease was *ultra vires*, and void, therefore, on its face; as also void, because, by its terms, hindering creditors; but its general tenor was, as already mentioned; and as in the first bill the Minnesota Company asked that the fund arising from the working of the road should be applied in satisfaction of the Cleveland judgment, for an account, &c., so the only prayer of Graham & Scott was that the same money might be applied in payment of *their* debt.

The essential question in both cases, therefore, considered by the court, was this: whether the lease made to Chamberlain, and the judgment confessed in his favor by the La Crosse Company, in 1857, was annulled as between *the*

parties to the lease and judgment, by the decree of the District Court of the United States for the District of Wisconsin, at the January Term, 1859, or only as against *Cleveland, the judgment creditor*, in whose suit against the company and Chamberlain the decree was rendered?

The court, it may here be said, had been informed by the counsel for the Minnesota Company and for Graham & Scott, as well as by the counsel for Chamberlain, that there was now pending in the Circuit Court of the United States for the District of Wisconsin a suit, brought by the company against Chamberlain, for the specific purpose of setting aside the contract between Chamberlain and the La Crosse Company.

Messrs. Carpenter and Cushing, for the appellant: The decree was not one merely postponing the lease and judgment of Chamberlain as to other creditors, but one which annulled the lease and vacated the judgment. The language of it is of that kind, in regard to which it is impossible to attempt to give it strength; as impossible as to prove an axiom; or to reason into force a seal plainly set upon a bond. No illustration can make the decree plainer; for no language can be more specific, complete, or absolute, than that of the decree itself. When a lease is "vacated, annulled, and made void, so that the same shall not hereafter *be of any force or effect whatever;*" and the lessee is "*perpetually* enjoined and restrained" from claiming or doing anything under or by virtue of the lease; can anything more be done to complete its destruction? When a judgment is "vacated, annulled, made void, set aside, so that the same shall have no further effect *whatever*," can it be asserted that the judgment is good as between the parties to it, and remains a lien upon the debtor's property against all the world, except one? If this lease and judgment have any existence after the sweeping decree above quoted, then it is not in the power of any court to destroy either of them. By nothing, in short, but by violence upon language, can this decree be read otherwise than as it is written,—a clear, complete, abso-

lute annihilation of both lease and judgment, to all intents and purposes, and as to all persons and parties.

But three parties, it will be remembered, were before the court.

1. Cleveland, a judgment creditor.
2. The Railroad Company.
3. Chamberlain.

It is certain Chamberlain could not thereafter manage the road under his lease, for he was "*perpetually* enjoined and restrained." The decree did not authorize Cleveland to work it, or in any way interfere with it, by appointing a receiver or otherwise. Who was to work it? Manifestly the railroad company and no one else. In the nature of things, the court must have intended that the company should resume control of the road after Chamberlain was enjoined. The court could not have intended that a great public enterprise like the one in question should be abandoned, its franchises become forfeited, and creditors, and everybody else connected with it, be ruined outright. It is impossible to say that this decree did not change the relations of Chamberlain and the company, *inter se*, as to this great property. It bound Chamberlain hand and foot, not for a time, nor for a purpose, but absolutely, perpetually, forever. It manifestly proceeded upon the ground, that the lease was an unauthorized act of the company, *ultra vires*, void as between the parties, and as between the parties and the public; and so it extirpated the lease, trampled it under foot and out of existence. It was no longer to be any protection to Chamberlain in his usurpation of great corporate franchises; no longer to protect the company in its evasion of its duty to work this road itself. And the moment the decree was enrolled, it became the right and the duty of the company to resume its abdicated franchises, and exercise them for the public benefit, according to its charter obligations to the State, and neither Chamberlain nor any one else could interfere.

It is the boast of a court of equity, that it does complete justice, and not by halves; that its decrees not only settle

rights as between plaintiff and defendants, but as between the defendants themselves. The reason given for making all persons interested in the subject-matter parties defendant is, that the court may by one decree accomplish what would otherwise require many suits, and may at once adjust the rights of all parties interested. This its decrees would not do, if they were not as binding among defendants in subsequent litigation, between themselves, as between the plaintiff and the defendants. Cases establish this quality of decrees in equity. *Farquharson* v. *Seaton** is a strong authority to show that this decree would be conclusive in any subsequent litigation upon the subject between Chamberlain and the company. So is *Chamley* v. *Lord Dunsany*,† in Irish chancery; a case decided by Lord Redesdale, as able a chancellor as ever sat.

The counsel also argued extensively on a comparison of the charter-powers of the La Crosse Company, which were exhibited in the record, with those exercised in the lease to Chamberlain, also shown, that the lease made by the company was beyond their charter-powers, and was void as *ultra vires;* that it was void, therefore, absolutely and irrespective of intent. They argued also that independently of this, it and the judgment were, in fact, made to defraud creditors, and that both were void on that score also.

After full argument by *Messrs. Cary and Carlisle, contra*—

The CHIEF JUSTICE delivered the opinion of the court.

These two appeals present the same controlling question to be decided upon the same facts and principles. That question is, Were the lease made to Chamberlain and the judgment confessed in his favor by the La Crosse Company, annulled as between the parties to the lease and judgment by the decree of 1859, or only as against Cleveland, the judgment creditor, in whose suit against the company and Chamberlain the decree was rendered?

* 5 Russel 45.

† 2 Schoale & Lefroy, 718.

It was the manifest intention of the Minnesota Company, in the bill filed by it, as the pleadings show, to seek a decree in this suit only upon hypothesis of the nullity of the Cleveland judgment, and the prayer for particular relief was framed accordingly. We are also informed by counsel that there is now pending in the Circuit Court of the United States for the District of Wisconsin, a suit, brought by the company against Chamberlain, for the direct object of setting aside the contract between Chamberlain and the La Crosse Company. In disposing of the cause before us, therefore, we shall not inquire whether that contract was or was not one which the La Crosse Company could legally make, nor whether the contract and the judgment were or were not in law void absolutely or as against creditors only. These matters may be better and more regularly investigated and passed upon in the cause now before the Circuit Court, and, if necessary, upon appeal from the decree in that cause. At present we shall only inquire into the effect of the decree of the District Court upon the article of agreement and the judgment which it declared to be void.

We have seen already that, according to the allegation of the Minnesota Company in their bill now before us, the issue between Cleveland, the complainant, and the La Crosse Company and Chamberlain, the respondents in the cause in which that decree was made, was upon the question whether the agreement and judgment were or were not void as against Cleveland and his judgment. The decree was evidently intended to determine that issue. It was, as evidently, not intended to determine the question whether the making of the agreement was beyond the corporate powers of the La Crosse Company, for there are no terms which affirm its inherent invalidity without regard to intent. It is our duty to construe the decree with reference to the issue it was meant to decide. Its words are very broad and very emphatic; but we cannot say that they were intended by the District Court to have any greater effect than to avoid and set aside, as against Cleveland, the agreement and the judgment impeached by his bill. We think, on the contrary, that a de-

cree having such an effect could not have been properly rendered upon the pleadings and issue in that cause. Neither the La Crosse Company nor Chamberlain sought to avoid the agreement or the judgment, nor asked any relief whatever as against each other. Indeed, the case shows that both regarded the agreement and the judgment as essential to their respective interests. We cannot ascribe to any court an intention, by a decree on such pleadings, to annul such an arrangement as between the parties to it, nor could we approve such action even were the intent clear beyond question. No question was made between Chamberlain and the La Crosse Company, nor could any question arise between them of any such nature as that between those parties and Cleveland, nor could they be required, in a suit prosecuted by Cleveland to enforce satisfaction of his judgment by setting aside their arrangement as void against creditors, to submit that arrangement, as between themselves, to the action of the court.

It is true that it is the constant practice of courts of equity to decree between codefendants upon proper proofs, and under pleadings between plaintiffs and defendants, which bring the respective claims and rights of such codefendants between themselves under judicial cognizance. In the case of *Farquharson* v. *Seton*, cited by counsel, the pleadings showed that Farquharson, as a co-defendant with Seton in another suit, had, by answer, set up the same case against him that he afterward set up by bill. In the former suit the decree had been against Farquharson, and he afterward sought to renew the litigation by an original proceeding, and it was held properly that the former decree, though between codefendants, was a bar. So in the case of *Chamley* v. *Lord Dunsany*, the general litigation was for the settling and marshaling of incumbrances, and it was held that where a case was made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity was entitled to make a decree between the defendants. In this case the decree was between defendants who asserted adverse interests in the incumbered estate.

But neither of these cases assert the doctrine maintained here for the appellants, that a court of equity may decree between defendants when neither pleadings nor proofs show any controversy or adverse interest between them. Nor have we been referred to any case which does assert that doctrine.

We think, therefore, that the decree of the District Court in the case of Cleveland against the La Crosse Company and Chamberlain must be regarded as having made void the arrangement between the company and Chamberlain only as against the judgment creditor, Cleveland, and not as having determined anything between those parties.

Nor do we intend here to determine anything as between them. We leave all questions concerning the validity of Chamberlain's judgment and its lien on the railroad, or touching the validity of the articles of agreement between Chamberlain and the La Crosse Company, or relating to the rights of parties in or to Chamberlain's receipts under that agreement, to be investigated and determined in the suit now pending in the Circuit Court.

Nor do we understand the decrees dismissing the bills in the two cases before us as determining anything on either of these points, but only as determining that the Cleveland decree adjudged nothing between Chamberlain and the La Crosse Company, and, therefore, cannot be regarded as evidence of the annulment of the contract between them in another suit where the validity of the contract is directly in controversy.

In the second of the cases before us, that of Graham and Scott *v.* Chamberlain and The La Crosse Company, there are averments in the bill which would require an answer if the general structure and the special prayer of the bill and the absence of a general prayer did not show that in this case, as in the case of the Minnesota Company, the real object of the suit was to establish the Cleveland decree as an absolute bar to the assertion by Chamberlain of any right whatever under his agreement and judgment. We do not think it such a bar, and therefore, without prejudice to any

suit which is now pending, or may be hereafter brought, to determine any other controversy of the La Crosse Company, or of its creditors, or of its successors in right or interest, we shall affirm the decrees of the Circuit Court in the two cases now before us by appeal.

AFFIRMANCE ACCORDINGLY.

GILMAN v. PHILADELPHIA.

The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those on which they lie; and includes, necessarily, the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise. And it is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.

This power, however, covering as it does a wide field, and embracing a great variety of subjects, some of the subjects will call for uniform rules and national legislation; while others can be best regulated by rules and provisions suggested by the varying circumstances of differing places, and limited in their operation to such places respectively. And to the extent required by these last cases, the power to regulate commerce may be exercised by the States.

To explain. Bridges, turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and the commerce which passes over a bridge may be much greater than that which will ever be transported on the water which it obstructs. Accordingly, in a question whether a bridge may be erected over one of its own tidal and navigable streams, it is for the municipal power to weigh and balance against each other the considerations which belong to the subject—the obstruction of navigation on the one hand, and the advantage to commerce on the other—and to decide which shall be preferred, and how far one shall be made subservient to the other. And if such erection be authorized in good faith, not covertly and for an unconstitutional purpose, the Federal courts are not bound to enjoin it.

However, Congress may interpose whenever it shall be deemed necessary, by either general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority, both the legislative and judicial power of the nation are supreme.

Annunciating these principles on the one hand and on the other, the court refused to enjoin, at the instance of a riparian owner, to whom the injury would be consequential only, a bridge about to be built, under the authority of the State of Pennsylvania, by the city of Philadelphia, over the river Schuylkill, a small river—tidal and navigable, however, and on which a great commerce in coal was carried on by barges—which river was wholly within the State of Pennsylvania, and ran through the corporate limits of the city authorized to erect the bridge; and on both sides of which citizens in great numbers lived, and on both sides of which municipal authority was exercised on one as much as on the other; the bridge being a matter of great public convenience every way, and another bridge, just like it, having been erected and in use for many years, over the same stream, about five hundred yards above.

THE Constitution gives to *Congress* power to "regulate commerce between the States;" and this case was one relating to the respective jurisdiction of a State and of the United States over tide and navigable waters. The case was thus:

The city of Philadelphia, as originally laid out by Mr. Penn, was situated *between* the Delaware and Schuylkill Rivers; the former a wide river, on the east of the city; the latter a small and narrow stream, on the west, which, making a curve below the city, falls into the far larger water, about six miles *below* the town.

This river Schuylkill is tidal from its mouth, seven and a half miles upwards—that is to say, completely *past* every part of the rear of the city—and though narrow, muddy, and shallow, is navigable for vessels drawing from eighteen to twenty feet of water. *It is wholly within the State of Pennsylvania.* No large vessels of any kind are seen upon it. Being one outlet of the coal regions of Pennsylvania, the principal, almost the sole commerce of the river is coal. But this is a very large commerce, and one of importance to this country generally. Great numbers of persons, from many States, are engaged in it; and many small steamers, barges, and other vessels concerned in it, are properly enrolled and licensed as vessels of the United States. Millions of dollars have been invested in property on the Schuylkill front of the built city, meant to assist the coal trade. The coal above spoken of as the subject of this river's commerce, is brought by canal-boats into the river, just at or above

Philadelphia. The canal-boats are then towed by small steam-tugs along the river.

So important, indeed, was this trade, in connection with the Schuylkill, considered in 1853, that in that year or thereabouts, when the legislature of the State proposed to allow the Penrose Ferry bridge—a bridge some distance *below* any ever previously erected, and over deeper and broader parts of the stream—the city of Philadelphia, by its councils, then largely, perhaps, influenced by traders in a great staple of the city, remonstrated against any legislative license for the new means of crossing; declaring that, by "this dangerous obstruction, trade amounting to more than a million of tons annually would be seriously impaired, and driven from that portion of the port; and that the large investments of the city in her gas-works, and other property on the Schuylkill, and a large proportion of all the wharf-front, would be greatly injured by any further bridge below Gray's Ferry, now the lowest bridge upon the Schuylkill." The bridge, however, was authorized.

The space from river to river—the width of the neck of land, that is to say, on which "Philadelphia" stands—may be about two miles.

Notwithstanding, however, the separating river, residents of Philadelphia, more than fifty years ago, had their rural homes on the west side of the Schuylkill. Here was Lansdowne, the Woodlands, and Belmont, and Solitude; well-known places in the local history of Philadelphia. Little villages, also, Mantuaville, Hamiltonville, &c., grew up there. From necessity, the great roads from the interior, including that from the State capital, came to the city in this direction. Still the region was without the city limits.

In 1854, the old charter of Philadelphia was abrogated. "Consolidation" was thought advisable. What had been the county of Philadelphia was made the city, and the region west of the Schuylkill was placed under the same government completely as the region east. Lighting, paving, police, penny-postage, and such like things as had before belonged to the "city," now were imparted to the new

region. Mantuaville, Hamiltonville, &c., became forgotten titles; and "West Philadelphia" usurped, in common talk, their place. The streets running from east to west, in "Philadelphia," were carried, by name, and continuous line of survey, so far as practicable, west of the Schuylkill; and the numbers which, beginning in the old city on the Delaware with Front Street, and running westward *to* the Schuylkill, in progressive numbers up to Thirtieth, reappeared across the river in Thirty-first Street, running to a number not yet practically familiar to the citizens. From its cheaper ground and fresher air, in connection with street cars found west of the river as east, "West Philadelphia"—a sort, as yet, of *urbs in rure*, or *rus in urbe*—had become a residence for many hundreds of persons who passed more or less of every day in the walks of business in the older parts of the town.

So too of later years, the citizens had laid out various cemeteries, the Woodlands and others, on the western side of the river; and had here fixed numerous institutions closely connected with the city corporation, itself, or with churches, &c., in the city; the vast Blockley Hospital, the Burd Orphan Asylum, Christ Church Hospital, and other like establishments of charity.

From an early date the river at and just above and below the city, that is to say within its tidal and navigable parts, had been treated by the State of Pennsylvania as more or less within her jurisdiction.

Thus in 1798, what was then called the Permanent Bridge, a bridge across the river at Market Street, was authorized,* and in 1799 a lot granted by the State for its purposes.† This bridge was begun in 1801 and finished in 1805, Judge Peters, the district judge of the Federal court of Pennsylvania, himself distinguished as an admiralty lawyer, who was the proprietor of Belmont, near one end of it, having been chiefly instrumental in the erection. In 1806, a bridge at

* 3 Smith's Laws, 312. † Id. 362.

Gray's Ferry (permanent) was authorized; 75 feet high.* In the same year the State regulated "the upper and lower ferries"† opposite the city. In 1811 another bridge was authorized, at the upper ferry,‡ which was afterward built, burnt down, and rebuilt. In 1815 a large canal, the Schuylkill Navigation Company, was authorized, which drains the river immediately above the city.§ It was completed in 1826. In 1822 the Fairmount Water-works, which *dam* the river and supply the old city of Philadelphia with water out of the river, were completed. In 1837‖ a bridge was authorized to be built by the Philadelphia, Wilmington, and Baltimore Railroad Company, with a draw of 33 feet, and was afterwards built below the town. In 1838¶ the West Philadelphia Railroad Company was authorized to build a bridge at Market or Callowhill Street. In 1839** a free bridge was authorized at Arch Street. In 1852†† free bridges were authorized at Chestnut Street and at Girard Avenue. *None of these last four bridges were ever built.*

Over one of these bridges runs the great Central Railroad of Pennsylvania; and over another, below the built city, the Gray's Ferry bridge already mentioned, runs the railway from Philadelphia to Baltimore, which leads from the North to Washington City and the South. This railroad bridge—which has a draw, however—was built in 1838; though a draw-bridge had been there from a time long before the Revolution.

The right of the State to authorize these bridges had not been seriously questioned by any one, while undoubtedly the river from its mouth to and beyond the port of Philadelphia is and has been considered as an ancient, navigable, public river and common highway, free to be used and navigated by all citizens of the United States.

The only legislation, apparently, which Congress had made about the river was in 1789 and in 1790, in both which

* 4 Sm. Laws, 297. † Id. 347. ‡ 5 Id. 221. § 6 Id. 257.
‖ Pamphlet Laws of 1836–7, p. 20. ¶ Pamphlet Laws of 1837–8, p. 697.
** Pamphlet Laws of 1838–9, p. 100. †† Pamphlet Laws of 1852.

years* Philadelphia was declared a port of entry; in 1793,† when the coasting laws were applied to it; in 1799,‡ when two districts were created in Pennsylvania;§ in 1822, when Philadelphia was made the sole port of entry for the Philadelphia district; and in 1834,‖ when the limits of the port were enlarged on the Delaware front. The important acts seemed to be those of 1799 and 1834. The former is in these words:

"The district of Philadelphia shall include all the shores and waters of the River *Delaware, and the rivers and waters connected therewith* lying within the State of Pennsylvania; and the *City of Philadelphia* shall be the *sole port of entry and delivery of the same.*"

The subsequent act (that of 1834) thus reads:

"The port of entry and delivery for the district of Philadelphia shall be bounded by the *Navy Yard on the south*, and *Gunner's Run on the north*, anything in any former law to the contrary notwithstanding."

No act spoke of the Schuylkill as within the port: though undoubtedly by its charter the city extended to the Schuylkill. The soundings of the Coast Survey, authorized by the United States, do not come into the Schuylkill.

The "Navy Yard" is on the Delaware. "Gunner's Run" was a stream in the north of the city, falling into the Delaware; but nowhere touching or feeding the Schuylkill.

Notwithstanding, however, the numerous bridges authorized by the State and the two or three that had been built, but one *principal* connection existed practically, between the two parts of the built and populous city; and this was the old Permanent or Market Street Bridge: a bridge running from the western end of one great east and west thoroughfare of the city—perhaps the greatest—across the stream; and connecting West Philadelphia with the more populous "city" as a short and narrow isthmus might connect two

* 1 Stat. at Large, 82, 148. † Id. 305.
‡ Id. 682. § 3 Id. 662. ‖ 4 Id. 715.

GILMAN
vs
PHILADELPHIA

To Face P 718
3 Wallace

Penn's Rail Road

To Fairmount Bridge

Penn's R.R.

MARKET

ST.

PIER

PIER

PHILADELPHIA

LINE

DOCK

Gilman's Wharf

RIVER CHANNEL

LINE

DOCK

Gilman's Wharf

DOCK

SCHUYLKILL CHANNEL

PHILADELPHIA

CHESTNUT

5 ft. 8 ft. 14 ft. 17 ft. 43 ft.

PIER 27

29 ft. 17 ft. 11 ft.

ST.

WEST

WHARF

WHARF

OLD

To Gray's Ferry Bridge

E. Bourquin Lith. 31 S. 6th St. Phila.

continents. There was, indeed, the Wire or Suspension Bridge, at Fairmount; rather above the city at its north extremity; and Gray's Ferry, sometimes called Baltimore Railroad Bridge, at its southern end, and below the populous districts. But, as already said, the old bridge was the great line of transit—artery and ligament at once—between the districts.

In this state of things, not much set out in the pleadings, but being matters of common notoriety, and as such spoken of at the bar, the Commonwealth of Pennsylvania in 1857 authorized the City of Philadelphia to erect a permanent bridge over the Schuylkill at Chestnut Street. This street was about five hundred feet below Market Street, where was the other and older bridge. The contemplated erection would be, of course, over a part of the Schuylkill that was tidal wholly, and navigable. Chestnut Street now had an existence on both sides of the river. On the eastern, it is one of the chief thoroughfares of Philadelphia, and in West Philadelphia, in anticipation of connection with Chestnut Street on the east, was daily assuming importance. The contemplated bridge would in fact connect parts of one street, municipally speaking; a street having one part on the east and one part on the west of the stream; here about four hundred feet across.

The city being about to begin the erection, Gilman, of New Hampshire, owning valuable coal wharves on the west side of the river, *just below the old bridge*, and which by the erection of the proposed bridge at Chestnut Street would be shut up between the two erections, now filed his bill in the Circuit Court for Pennsylvania to prevent the structure. It was conceded that he was neither a navigator nor a pilot, nor the owner of a licensed coasting vessel; and this was objected to him. His title to ask relief rested on his ownership of coal wharves, as mentioned, and his citizenship in New Hampshire.

His bill charged that a bridge at that point without suitable draws would be an unlawful obstruction to the navigation

of the river, and an illegal interference with his rights, and was a public *nuisance* producing to him a special damage; that it was not competent for the legislature of Pennsylvania to sanction such an erection, and that he was entitled to be protected by an injunction to stay further progress on the work, or to a decree of abatement, if it should have been proceeded with to completion.

The answer admitted the erection of the bridge complained of, justified such erection under the act of the legislature of Pennsylvania, and alleged that other obstructions of a similar or greater extent had theretofore been placed across the stream at a higher point of the river, or beyond the complainant's wharves, by virtue of other acts of the same legislature. The answer conceded that the bridge would prevent masted vessels from approaching to or unloading at the complainant's wharves, and insisted that this was the only injury suffered by the complainant, and that for it the City of Philadelphia, the defendant, was able to respond in damages. The answer further alleged that the proposed bridge was a necessity for public convenience.

The bridge, it was admitted, would be not more than thirty feet high—the same height as the old one above, at Market Street. Being an erection of the city it was built in the best style of science, and with the greatest practicable regard to the navigation and general interests of commerce; but it necessarily somewhat impeded navigation. The navigation at that point required a wide channel. One pier was indispensable. Vessels with masts could not pass, and the property of the complainant was rendered less valuable.

Mr. Justice Grier dismissed the bill. The same question nearly had been then recently considered by him very fully, in an application made, in New Jersey, to restrain the erection of a railroad bridge over the Passaic, at Newark. The matter had been there fully argued and deliberately considered; an opinion being delivered from the bench, dismissing the appeal. That decree had, by the judgment of this court, been affirmed; though the case was not reported, the judgment of affirmance having been by an

equally divided bench. His honor, in accordance with what was declared in *Queen* v. *Willis*,* considering that an affirmance of a decree was binding irrespective of the number of judges who were in favor of such judgment; and that the obligation, in point of mere *precedent*, was the same, whether the court was full and unanimous, or partial and divided, hardly conceived the question open for discussion before him.† The case was, therefore, not argued below.

In this court it was elaborately and well discussed by *Messrs. George Harding and Courtland Parker, for the appellant Gilman; and by Messrs. F. C. Brewster and D. W. Sellers, contra, for the City of Philadelphia.*

Mr. Justice SWAYNE delivered the opinion of the court.‡

There is no contest between the parties about the facts upon which they respectively rely.

The complainants are citizens of other States, and own a valuable and productive wharf and dock property above the site of the contemplated bridge. The river is navigable there for vessels drawing from eighteen to twenty feet of water. Commerce has been carried on in all kinds of vessels for many years to and from the complainants' property. The bridge will not be more than thirty feet above the ordinary high-water surface of the river, and hence will prevent the passage of vessels having masts. This will largely reduce the income from the property, and render it less valuable.

The defendants are proceeding to build the bridge under the authority of an act of the legislature of Pennsylvania. The Schuylkill River is entirely within her limits, and is "an ancient river and common highway of the State." For

* 10 Clark & Finnelly's Appeal Cases, 684. See Krebs v. Carlisle Bank, 2 Wallace, Jr, note, 49.

† As part of the judicial history of an interesting question, as well as for the value which the opinion itself has, a report of the case referred to above and decided by Grier, J., will be found in a note.—See Appendix. No. III.

‡ Nelson, J., not having sat, and taking no part in the decision.

many years it has been navigable for masted vessels for the distance of about seven and a half miles only, from its mouth. At Market Street, about five hundred feet above Chestnut, there is a permanent bridge without a draw over the same river, and no higher above the water than it is intended to elevate the bridge about to be built. A bridge at Market Street was erected prior, perhaps, to the year eighteen hundred and nine. It rendered the passage of masted vessels above that point impossible, and since that time comparatively few have appeared above the foot of Chestnut Street. The river there has since been used chiefly as a highway for canal-boats.

The injury to the property of the complainants will be entirely consequential. A large city is rising up on the opposite side of the river. The new bridge is called for by public convenience.

The case resolves itself into questions of law.

At the threshold of the investigation we are met by the objection from the defendants, that the complainants, "not being specially interested in navigation, cannot intervene for its protection." It is said, "that they are not the owners of licensed coasting vessels, and are not pilots nor navigators."

As regards this objection, the case is not essentially different in principle from the Wheeling bridge case.

The further objection was also taken in that case, that if a nuisance existed, it was of a public nature, and was an offence against the sovereignty whose laws were violated, and that the sovereign only could intervene for the correction of the evil.

It was answered by the court, that wherever a public nuisance is productive of a specific injury to an individual, he may make it the foundation of an action at law, and if the injury would be irreparable, that a court of equity will interpose by injunction. The decision was not put in anywise upon the ground of the trustee character of the complainant. The State alleged that she had lines of improvements for the transportation of freight and passengers

extending from the east to Pittsburg, and that by reason of the bridge about to be erected across the river at Wheeling, and the obstruction which it would cause to the navigation of that stream, business would be diverted from her works to other channels, and that the income from her works would thereby be greatly lessened, and their value diminished or destroyed. The court said:

"The State of Pennsylvania is not a party in virtue of her sovereignty. It does not come here to protect the rights of its citizens, . . nor can the State prosecute the suit upon the ground of any remote or contingent interest in herself. It assumes and claims, not an abstract right, but a direct interest, and that the power of this court can redress its wrongs, and save it from irreparable injury. . . . In the present case, the rights assumed and relief prayed are in no respect different from those of an individual. From the dignity of the State, the Constitution gives to it a right to bring an original suit in this court, and this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case."

In regard to the facts it was said:

"And this injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily, prosecutions for the wrong done; and from the nature of that wrong, the compensation could not be measured or ascertained with any degree of precision. The effect would be, if not to reduce the tolls on these lines of transportation, to prevent their increase with the increasing business of the country. . . . In no case could a remedy be more hopeless than an action at common law. The structure complained of is permanent, and so are the public works sought to be protected. The injury, if there be one, is as permanent as the works from which it proceeds, and as are the works affected by it. And whatever injury there may now be, will become greater in proportion to the increase of population and the commercial development of the country. And in a country like this, where there would seem to be no limit to its progress, the injury complained of would be far greater in its effects than under less prosperous circumstances."

The law upon the subject is learnedly and ably examined. The objections were overruled. Considerations of fact, of the same character with those adverted to, exist in the case before us, and the reasoning and conclusions there are alike applicable in both cases. Whatever might be our views upon the legal proposition, in the absence of this adjudication, we are, as we think, concluded by it. It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. "*Misera est servitus ubi lex est vaga aut incerta.*" This brings us to the examination of the merits of the case.

The defendants assert that the act of the legislature, under which they are proceeding, justifies the building of the bridge.

The complainants insist that such an obstruction to the navigation of the river is repugnant to the Constitution and laws of the United States, touching the subject of commerce.

These provisions of the Constitution bear upon the subject:

"Congress shall have power . . to regulate commerce with foreign nations, among the several States, and with the Indian tribes; . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

"This Constitution, and the laws which shall be made in pursuance thereof, . . shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The act of the 18th of February, 1793, authorizes vessels enrolled and licensed according to its provisions to engage in the coasting trade.

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the

United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.* This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.

It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.†

A license under the act of 1793, to engage in the coasting trade, carries with it right and authority. "Commerce among the States" does not stop at a State line. Coming from abroad it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. Wherever "commerce among the States" goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights.‡ There can be no doubt that the coasting trade may be carried on beyond where the bridge in question is to be built.

We will now turn our attention to the rights and powers of the States which are to be considered.

The national government possesses no powers but such as have been delegated to it. The States have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the Federal Constitution.

* Gibbons v. Ogden, 9 Wheaton, 1; Corfield v. Coryell, 4 Washington Circuit Court, 378.

† United States v. New Bedford Bridge, 1 Woodbury & Minot, 420, 421; United States v. Coombs, 12 Peters, 72; New York v. Milne, 11 Id. 102, 155.

‡ Gibbons v. Ogden, 9 Wheaton 1; Steamboat Co. v. Livingston, 3 Cowen, 713.

It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. "When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government."*

In *Pollard's Lessee* v. *Hagan*,† this court said:

"The right of eminent domain over the shores and the soil under the navigable waters, *for all municipal purposes, belongs exclusively to the States* within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. . . . . But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but *municipal power*, subject to the Constitution of the United States and *the laws which shall have been made in pursuance thereof.*"

In *Gibbons* v. *Ogden* it is said:

"Inspection laws form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass."

Bridges are of the same nature with ferries, and are undoubtedly within the category thus laid down.‡

The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can

* Martin et al. v. Waddell, 16 Peters, 410. † 8 Howard, 230.

‡ People v. S. & R. R. R. Co., 15 Wendell, 113.

be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the States.

Whether the power in any given case is vested exclusively in the General Government depends upon the nature of the subject to be regulated. Pilot laws are regulations of commerce; but if a State enact them in good faith, and not covertly for another purpose, they are not in conflict with the power "to regulate commerce" committed to Congress by the Constitution.*

In the Wheeling bridge case this court placed its judgment upon the ground "that Congress had acted upon the subject, and had regulated the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same, and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of Congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the Ohio River, the act of the legislature of Virginia afforded no authority or justification. *It was in conflict with the acts of Congress, which were the paramount law.*"†

The most important authority, in its application to the case before us, is *Wilson* v. *The Blackbird Creek Marsh Co.*‡ Blackbird Creek extends from the Delaware River into the interior of the State of Delaware. The legislature of the State passed an act whereby the company were "authorized and empowered to make and construct a good and sufficient dam across said creek, at such place as the managers or a majority of them shall find to be most suitable for the purpose," &c. The company proceeded to erect a dam, whereby the navigation of the creek was obstructed. The defendant, being the owner of a sloop of nearly a hundred tons, regu-

* Cooly v. The Board of Wardens, 12 Howard, 319.

† 18 Id. 430. ‡ 2 Peters, 250

larly enrolled and licensed under the laws of the United States, broke and injured the dam. The company brought an action of trespass against him in the Supreme Court of Delaware. The defendant pleaded that the place where the trespass was committed was "a public and common navigable creek, in the nature of a highway, in which the tides had always flowed and reflowed; and that all the citizens of the United States had a right, with sloops, and other vessels, to navigate and pass over the same at all times at their pleasure," &c., and therefore, &c.

The plaintiffs demurred. The Supreme Court sustained the demurrer and gave judgment in their favor. The Court of Appeals of that State affirmed the judgment. The case was brought into this court by a writ of error. In delivering the opinion of the court, Chief Justice Marshall said:

"But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.'"

He remarked that if "Congress had passed any law which bore upon the subject the court would not feel much difficulty in saying that a State law, coming in conflict with such an act, would be void;" and added, in conclusion:

"But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

This opinion came from the same "expounder of the Constitution" who delivered the earlier and more elaborate judgment in *Gibbons* v. *Ogden*. We are not aware that the soundness of the principle upon which the court proceeded has been questioned in any later case. We can see no difference in principle between that case and the one before us. Both streams are affluents of the same larger river. Each is entirely within the State which authorized the obstruction. The dissimilarities are in facts which do not affect the legal question. Blackbird Creek is the less important water, but it had been navigable, and the obstruction was complete. If the Schuylkill is larger and its commerce greater, on the other hand, the obstruction will be only partial and the public convenience, to be promoted, is more imperative. In neither case is a law of Congress forbidding the obstruction an element to be considered. The point that the vessel was enrolled and licensed for the coasting trade was relied upon in that case by the counsel for the defendant. The court was silent upon the subject. A distinct denial of its materiality would not have been more significant. It seems to have been deemed of too little consequence to require notice. Without overruling the authority of that adjudication we cannot, by our judgment, annul the law of Pennsylvania.

It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs.

It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation.

The States may exercise concurrent or independent power in all cases but three:

1. Where the power is lodged exclusively in the Federal Constitution.

2. Where it is given to the United States and prohibited to the States.

3. Where, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively.*

The power here in question does not, in our judgment, fall within either of these exceptions.

"It is no objection to distinct substantive powers that they may be exercised upon the same subject." It is not possible to fix definitely their respective boundaries. In some instances their action becomes blended; in some, the action of the State limits or displaces the action of the nation; in others, the action of the State is void, because it seeks to reach objects beyond the limits of State authority.

A State law, requiring an importer to pay for and take out a license before he should be permitted to sell a bale of imported goods, is void,† and a State law, which requires the master of a vessel, engaged in foreign commerce, to pay a certain sum to a State officer on account of each passenger brought from a foreign country into the State, is also void.‡ But, a State, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another State, to be sold by retail or to be sold at all without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper.§ Under quarantine laws, a vessel registered, or enrolled and licensed, may be stopped before entering her port of destination, or be afterwards removed and detained elsewhere, for an indefinite period; and a bale of goods, upon which the duties have or have not been paid, laden with infection, may be seized un-

* Houston v. Moore, 5 Wheaton, 49; Federalist, No. 32.

† Brown v. Maryland, 12 Wheaton, 419.

‡ Passengers' Cases, 7 Howard, 273. § License Cases, 5 Id. 504

der "health laws," and if it cannot be purged of its poison, may be committed to the flames.

The inconsistency between the powers of the States and the nation, as thus exhibited, is quite as great as in the case before us; but it does not necessarily involve collision or any other evil. None has hitherto been found to ensue. The public good is the end and aim of both.

If it be objected that the conclusion we have reached will arm the States with authority potent for evil, and liable to be abused, there are several answers worthy of consideration. The possible abuse of any power is no proof that it does not exist. Many abuses may arise in the legislation of the States which are wholly beyond the reach of the government of the nation. The safeguard and remedy are to be found in the virtue and intelligence of the people. They can make and unmake constitutions and laws; and from that tribunal there is no appeal. If a State exercise unwisely the power here in question, the evil consequences will fall chiefly upon her own citizens. They have more at stake than the citizens of any other State. Hence, there is as little danger of the abuse of this power as of any other reserved to the States. Whenever it shall be exercised openly or covertly for a purpose in conflict with the Constitution or laws of the United States, it will be within the power, and it will be the duty, of this court, to interpose with a vigor adequate to the correction of the evil. In the Pilot case, the dissenting judge drew an alarming picture of the evils to rush in at the breach made, as he alleged, in the Constitution. None have appeared. The stream of events has since flowed on without a ripple due to the influence of that adjudication. Lastly, Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary.

Since the adoption of the Constitution there has been but one instance of such legislative interposition; that was to save, and not to destroy. The Wheeling bridge was legalized, and a decree of this court was, in effect, annulled by an act of Congress. The validity of the act, under the power "to regulate commerce," was distinctly recognized by this court in that case. This is, also, the only instance, occurring within the same period, in which the case has been deemed a proper one for the exercise, by this court, of its remedial power.

The defendants are proceeding in no wanton or aggressive spirit. The authority upon which they rely was given, and afterwards deliberately renewed by the State. The case stands before us as if the parties were the State of Pennsylvania and the United States. The river, being wholly within her limits, we cannot say the State has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this court. It is not denied that the defendants are justified if the law is valid. We find nothing in the record which would warrant us in disturbing the decree of the Circuit Court, which is, therefore,

AFFIRMED WITH COSTS.

Mr. Justice CLIFFORD (with whom concurred WAYNE and DAVIS, JJ.), dissenting:

I concur in many of the views expressed by the majority of the court in the introductory part of the opinion which has just been read; and if the decree of the court had been such as the propositions there laid down would seem to demand, I might have felt justified in remaining silent as to certain other propositions advanced in the concluding part of the opinion, which appear to be of an inconsistent character, and to which I can never assent. Such, however, is not the fact. On the contrary, the order of the court is that the decree entered in the court below, dismissing the bill of

complaint, be affirmed, and it must be understood that the majority of the court, in directing that decree, adopt the views expressed in the concluding part of the opinion, else they never could have agreed to that result. Regarding the matter in that light, it seems to be an obvious duty that I should express my dissent from the decree of the court, and briefly assign the reasons why I cannot concur in the conclu sion to which the majority of the court have come.

1. Complainants are the owners of a valuable wharf prop erty situated upon the River Schuylkill, within the port of Philadelphia, which is a port of entry established by an act of Congress passed at a very early period in the history of the country.* They claim that the River Schuylkill is an ancient public river and common highway, and that it is navigable for ships and vessels of the largest description, from above their wharf property to the sea; that many of the ships and vessels navigating the river are duly enrolled and licensed at the port of Philadelphia and other ports of entry of the United States, under and by virtue of the acts of Congress in that behalf provided; and that foreign ves- sels, entitled to certain rights of commerce and navigation, have long been accustomed to, and are of right entitled to navigate that river, with cargoes bound to the port of Phila- delphia; and that such vessels, in pursuance of that right, have been accustomed to enter their cargoes at the port, and to discharge the same at the wharves of the port bordering on the river, and to load with return cargoes at the said wharves, and clear direct to foreign ports.

Injury alleged is, that the respondents have collected ma- terials, employed workmen, and are now engaged in erecting and constructing a bridge across the channel of the river at Chestnut Street, in the city of Philadelphia, below the place where the wharf property of the complainants is situated. Bridge about to be erected is, as alleged, and as the plan shows, without any draw, and with but a single pier and at an elevation of only thirty-three feet above the ordinary water surface of the river.

* 1 Stat. at Large, 632.

Substance of the charge as contained in the bill of complaint is, that the erecting and keeping the bridge over and across the channel of the river, in the manner as proposed and threatened, will impede and obstruct the navigation of the river, and will hinder and interrupt the citizens in their lawful use of the same as a common and public highway; and they also charge that it will hinder and obstruct licenses granted under the enrolment act, and that it will hinder and obstruct the subjects of foreign countries in the exercise of their rights of commerce and navigation; and that it will interrupt, diminish, and greatly tend to destroy the trade, commerce, and business of the citizens upon the river, to the great damage and common nuisance of all the citizens of the United States, and their irreparable injury.

Statement of complainants is, that many millions of dollars have been expended by the citizens of the United States in the construction of works of public improvement, terminating at the head of tide-water navigation on that river, which depend, in a great measure, for their prosperity, usefulness, and value upon the free and unobstructed use of the river; and in this connection they charge that the bridge will greatly injure and lessen the value of their wharf property upon the river, and will divert commerce and trade therefrom, and will thereby diminish the tolls, revenue, and profits of their wharves, and will, in fact, destroy the trade and commerce to and from their wharves, to their great damage and irreparable injury.

Allegation of the bill of complaint also is, that the Schuylkill River, being a navigable river, and having a good tide-water navigation, extending to and beyond the wharf property of the complainants, and for about seven miles from its mouth, and being a branch of the River Delaware—which river passes by and between the States of New Jersey and Delaware—the citizens of all the States are lawfully entitled to its free navigation, and to carry on their lawful commerce without hindrance or obstruction by the respondents, under the pretence of State authority, or any pretence whatever.

Respondents justify, under an act of the General Assembly of the State of Pennsylvania, authorizing them to build the bridge described in the bill of complaint.

2. Complainants insist that the bridge is a public nuisance, and pray that it may be abated, and for such other and further relief in the premises as the nature of the case and equity and good conscience may require. Propositions of the complainants are, that the River Schuylkill is a public navigable river, subject to the power of Congress to regulate commerce with foreign nations and among the several States, as conferred in the Constitution; and that Congress has exercised that power, and regulated the navigation of that river within the meaning of the Constitution, and has thereby secured to the citizens of the several States, by virtue of their authority so conferred by the Constitution, the free and unobstructed use of the river as a paramount right, for all the purposes of commerce and navigation.

Congress, as the complainants say, has exercised the power and regulated the navigation of the river; and their next proposition is, that the bridge as constructed, or threatened to be constructed, interferes with the enjoyment of that use, and is inconsistent with, and in violation of the acts of Congress regulating the navigation, and destructive of the rights derived under them, and that to the extent of that interference with the free navigation of the river, the act of the legislature of the State of Pennsylvania affords to the respondents no authority or justification, because it is in conflict with the acts of Congress, which are the paramount law.

Argument to show that the ground assumed by the complainants is exactly the same as that on which the case of the Wheeling bridge proceeded and was finally decided, is unnecessary, because the proposition stands forever affirmed by the authority of this court, in an opinion pronounced by one of the justices who decided the cause, and who still holds a seat on this bench.* Referring to that opinion, it will be seen that the judge who delivered it first stated the

* The Wheeling Bridge, 18 Howard, 430.

grounds assumed in the bill of complaint, and then said: "Such being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion that the obstruction of the navigation of the river by the bridge was a violation of the right secured to the public by the Constitution and laws of Congress, nor in applying the appropriate remedy in behalf of the plaintiff." None of these propositions are denied in the introductory part of the opinion of the majority of the court. On the contrary, the opinion just read repeats the views expressed by Mr. Justice Nelson in the case already referred to, and impliedly indorses those views as a correct exposition of the power of Congress over public navigable rivers emptying into the sea, and of the right of this court to redress private injuries resulting from unlawful obstructions in the same, to the paramount right of navigation.

8. Conceding the correctness of those views as applied in the case in which they were expressed, the opinion of the majority of the court, as just read, sets up a distinction between that case and the case under consideration, and maintains that those views are not applicable to the present case. Stripped of all circumlocution, the supposed distinction, as maintained in the opinion of the majority of the court, is, that in the case at bar it does not appear that Congress has passed any act regulating the navigation of the river described in the bill of complaint. Power of Congress to regulate commerce among the several States, as well as with foreign nations, is fully admitted, and the concession is—at least impliedly from the course of the argument—that this court would have jurisdiction in the case, and that the complainants would be entitled to relief, if it appeared that Congress had exercised the power as conferred, and had regulated the navigation of the river within the meaning of the Constitution. Precise doctrine advanced, as I understand the opinion, is, that Congress has not passed any act regulating the navigation of the river, and that inasmuch as there is no Federal regulation upon the subject, the law of the State legislature, authorizing the erection of the bridge,

is a valid law, even if the bridge is an obstruction to navigation, because the State law is not in conflict with any act of Congress giving protection to the otherwise paramount right of navigation. Implied admission is, that if there is an act of Congress regulating the navigation of the river, then the right of navigation is a paramount right, and the conclusion must be that, in that event, no law of the State could afford any justification to the respondents in erecting the bridge, if it is a public nuisance and an obstruction to that paramount right.*

4. Dissenting from the opinion of the majority of the court on this point, I hold that Congress has regulated the navigation of this river within the meaning of the Constitution, and that the law of the State, pleaded in justification of the acts of the respondents, so far as it authorizes an obstruction to the free navigation of the river, is an invalid law. Commerce, it is admitted, includes navigation; and it is well settled, on the authority of this court, that in regulating commerce with foreign nations, or among the States, the power of Congress does not stop at the jurisdictional lines of the several States. Express decision of this court is, that commerce with foreign nations is that of the whole United States, and that the power of Congress to regulate it may be exercised in the States wherever the foreign voyage may commence or terminate; and that the commerce among the States cannot be stopped at the exterior boundary of the State, but may be introduced into the interior.†

5. Right of intercourse between State and State was a common-law privilege, and as such was fully recognized and respected before the Constitution was formed. Those who framed the instrument found it an existing right, and regarding the right as one of high national interest, they gave to Congress the power to regulate it. Such were the views of Marshall, C. J., as expressed more than forty years ago;

* Attorney-General v. Burridge, 10 Price, 350; Same v. Parmeter, Id. 378; Parmeter v. Attorney-General, Id. 412.

† Gibbons v. Ogden, 9 Wheaton, 194.

and he added, that in the exercise of this power Congress has passed an act for enrolling or licensing ships or vessels to be employed in the coasting-trade and fisheries, and for regulating the same. Respondents contended that the enrolment act did not give the right to sail from port to port, but confined itself to regulating a pre-existing right so far only as to confer certain privileges on enrolled and licensed vessels in its exercise; but the court promptly rejected the proposition, and held that where the legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. Direct adjudication was, that it would be contrary to all reason, and to the course of human affairs, to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself.

License, as the word is used in that act of Congress, means, say the court, permission or authority; and the court held that a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. Adopting the language of the court in that case, it certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license.

Ships and vessels enrolled and licensed under the acts of Congress, and no others, are deemed ships and vessels of the United States entitled to the privileges of ships or vessels employed in the coasting trade. Majority of the court, as stated in the opinion just read, admit that a ship or vessel of the United States, which is duly enrolled and armed with a coasting license, such as is required by the enrolment acts, may navigate along the coast of the United States, and may pass from the open sea into the public navigable rivers of the United States, and up the same as far as navigable waters extend. Coming more directly to the case under consideration, the opinion admits that such a ship or vessel has a right, under such an enrolment and with such a coast-

ing license, to navigate from the sea up the river described in the record to the wharves of the complainants.

6. Unrestricted and unexplained, that admission covers everything which the complainants claim, and shows conclusively that they are entitled to relief. But it is said that this right, under the circumstances of this case, is subject to the paramount right of the State to bridge or dam the river, and close it against all commercial intercourse. Extent of the right as conceded, therefore, is, that a ship or vessel duly enrolled and licensed, and sailing from the port of another State, may enter a public navigable river of the United States from the sea, unless the State through which the river flows as it falls into the sea has bridged the river, or constructed a dam across it, before the vessel arrives off the mouth of the river. Plain right of the owner of the vessel, in that state of the case, is to instruct the master to go about and return to the port of departure; but if the river is open when the ship or vessel arrives at its mouth, she may pass up to the highest port of entry, and discharge cargo and load for the return trip.

Her right to return is then undoubted, unless in the meantime the navigation of the river is forever closed by a bridge or dam constructed under the authority of the State, and in that event the owner of the vessel has the same privilege that he has in case of shipwreck. He may direct the master and mariners to return by land.

Doubtless a question may arise as to what is to be done in that state of the case with the impounded vessel and cargo, but, as that question is not involved in the present record, it must be left for future consideration. Such a rule as it seems to me, is contrary to all reason, and absolutely subversive of one of the great interests of the country, which, more than any other, induced the people of the colonies to call the convention which framed the Constitution.

7. Unquestionably the decision of the court in the case of *Gibbons* v. *Ogden* proceeded throughout upon the ground that the act for enrolling or licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating

the same, was of itself a sufficient regulation of the navigation of all the public navigable rivers of the United States to secure to the ships and vessels of the United States, sailing under the coasting license, the free navigation of all such public highways. Best exposition of the decision of the court in that case is to be found in the decree, where the court say that the several licenses set up by the appellant in his answer to the bill of complaint, which were granted under an act of Congress passed in pursuance of the Constitution of the United States, gave full authority to those vessels to navigate the waters of the United States for the purpose of carrying on the coastwise trade, any law of the State to the contrary notwithstanding; and that so much of the laws of the State as prohibited vessels so licensed from navigating the waters of the State by means of fire or steam is repugnant to the Constitution of the United States and void. Express as the language of that decree is, it is incomprehensible to me how it can be the subject of any difference of opinion.

Complete protection is afforded by the doctrines of that great case to all ships and vessels of the United States, duly enrolled and licensed, in navigating all the public navigable rivers of the United States which empty into the sea or into the bays and gulfs, which form a part of the sea, and they are all treated as arms of the sea and public rivers of the United States. None of the judges who participated in that decision even intimated that the Hudson was anything else than an arm of the sea and a public navigable river of the United States. Public navigable rivers, whose waters fall into the sea, are rivers of the United States in the sense of the law of nations and of the Constitution of the United States. They are so treated by all writers upon public law, and there is no well-considered decision of the Federal courts which does not treat them in the same way.*

8. Claim of the appellants, however, does not rest alone upon the doctrines of that case, but the proofs show that

* Propeller Commerce, 1 Black, 579.

their wharf property and the river at the place where it is situated are both within a port of entry, as established by an act of Congress.

Prior to the adoption of the Constitution the power to establish ports of entry was in the several States, but this court held, in the last opinion delivered in the case of the Wheeling bridge,* that the power in that behalf, was surrendered under the Constitution to the Federal Government, and left to Congress. Eighth section of the act of the 2d of March, 1799, provides that the district of Philadelphia shall include all the shores and waters of the River Delaware *and the rivers and waters connected therewith* lying within the State of Pennsylvania; and that the city of Philadelphia shall be the sole port of entry for the same.†

Subsequent provision is, that the port of entry and delivery for the district of Philadelphia shall be bounded by the navy yard on the south, and Gunner's Run on the north, anything in any former law to the contrary notwithstanding.‡

Appellees suggest rather than argue that the mouth of the river described in the bill of complaint is not included in that description, but the point is of no importance, because it is clear, beyond controversy, that the river at the place where the wharf property of the complainants is situated, and for a considerable distance above and below it, is within the acknowledged limits of the port. Ample confirmation of this view, if any be needed, will be found in the case of *Devoe et al.* v. *Penrose Ferry Bridge Co.*,§ which was decided by Mr. Justice Grier. He said the commerce on River Schuylkill below the port of Philadelphia is as much entitled to protection as that of the Ohio, Mississippi, Delaware, or Hudson; and that the complainants in that case had the same right to the interference of the court in their behalf as was shown by the State of Pennsylvania in the Wheeling bridge case. Although it is supposed the views of the learned judge have undergone some change as to the

* 18 Howard, 435.
† 1 Stat. at Large, 632.
‡ 4 Id. 715.
§ 3 American Law Register, 83.

jurisdiction of the Federal courts, it has always been supposed that he was entirely accurate in all the matters of fact on which the judgment of the court was founded.

9. Other acts of Congress are cited by the complainants as supporting the proposition under consideration, but it will not be necessary to give more than two of them any special examination. First section of the act of the 2d of March, 1819, divides the sea-coast and *navigable rivers of the United States* into two great districts, and the declared purpose of creating the districts is "for the more convenient *regulation* of the coasting trade." All the districts on the sea-coast and navigable rivers between the eastern limits of the United States and the southern limits of Georgia are included in the first district, and the second district includes all the districts on the sea-coast and *navigable rivers* between the River Perdido and the western limits of the United States.*

Subsequent acts created a third great district, and provided that it should include all the ports, harbors, sea-coasts, and *navigable rivers* between the southern limits of Georgia and the River Perdido, and that it should be subject to all the regulations and provisions of the prior act.†

Doubt, therefore, cannot be entertained that all of the public navigable rivers of the United States falling into the sea, or into the bays and gulfs which form a part of the sea, are included in one or the other of the three great commercial districts expressly established for the convenient regulation of the coasting trade.

Looking at these several acts it is not surprising that Marshall, C. J., should have said, in *Gibbons* v. *Ogden*, that "to the court it seems clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade." Strong support to that view of the law is also derived from the case of the Wheeling bridge, as appears in the first opinion delivered in the case.‡

* 3 Stat. at Large, 492.

† Id. 685.

‡ Wheeling Bridge, 18 Howard, 557.

Remarking upon this view of the case, the court say in effect that the navigability of the Ohio River is a historical fact which all courts may recognize. They add that for many years the commerce upon it has *been regulated* by Congress, under the commercial power, by establishing ports, requiring vessels which navigate it to take out licenses and to observe certain rules for the safety of their passengers and cargoes. Every one of those acts of Congress, from the moment they were passed, became and are, as applicable to the river described in the bill of complaint as to the Ohio, and there can be no doubt, as it seems to me, that they must be held to have the same effect. Nothing has been said respecting the case of *Wilson* v. *Blackbird Creek*,* because, in the view I take of it, the opinion has nothing to do with the present question. Judgment was rendered by the same court in that case which gave judgment in the case of *Gibbons* v. *Ogden*, and there is not a man living, I suppose, who has any reason to conclude that the constitutional views of the court had at that time undergone any change.

Instead of overruling that case, it will be seen that the Chief Justice who gave the opinion did not even allude to it, although as a sound exposition of the Constitution of the United States it is second in point of importance to no one which that great magistrate ever delivered. Evidently he had no occasion to refer to it or to any of its doctrines, as he spoke of the creek mentioned in the case as a low, sluggish water, of little or no importance, and treated the erection described in the bill of complaint as one adapted to reclaim the adjacent marshes and as essential to the public health, and sustained the constitutionality of the law authorizing the erection upon the ground that it was within the reserved police powers of the State.

Conclusion is, that Congress has regulated the navigation of this river, and that the State law under which the respondents attempt to justify is in conflict with those regulations, and therefore is void, and affords no justification to the re-

* 2 Peters, 250.

spondents. Admitting the facts to be so, then the complainants are entitled to recover even upon the principle maintained in the opinion of the majority of the court.

SECRIST v. GREEN.

1. An acknowledgment on the day of its date, before a master of chancery, in New York, of a deed executed 3d March, 1818—probate being made by a subscribing witness personally known to the master, of the identity of the party professing to grant with the party presenting himself to acknowledge—and the record of acknowledgment certifying that the grantor "consented that the deed might be recorded where necessary"—was a sufficient acknowledgment of the deed, by the laws of New York regulating the subject, at the date when the deed was made.
2. Having been so, and conveying land in Illinois, such deed was entitled to be recorded in Illinois; the laws of that State allowing deeds for lands in the State, executed out of it but within the United States, to be recorded when acknowledged or proved in conformity with the law of the State where executed; and when so recorded, it was properly read without other proof of execution.
3. Reputation being sufficient to establish death and heirship, a statement of them in a deposition, by an ancient witness, long and intimately acquainted with the family about which he testifies, and who says that certain children ("as appears from entries in the family Bible, and which I believe to be true,") died at such a time, and another child at another time, "as I am informed and believe,"—is not subject to exception at the trial.
4. When a decree finds that due legal notice of intended proceedings in partition had been given to all the heirs of a decedent, the finding is, in Illinois, *primâ facie* though not conclusive evidence of the fact.
5. Jurisdiction of a court being once established, its proceedings cannot be questioned collaterally by one not a party to them, and who seeks no rights under them.
6. By the laws of Illinois, a copy of a will proved in one State, and with its probate and letters duly authenticated under the act of Congress for the authentication of records to be used in others, may, after certain formalities gone through, be recorded in the county courts of a county of Illinois, where the testator had property. And when so recorded, certified copies of such county court records are evidence; being so under the general laws of the State.

GREEN brought ejectment against Secrist, in the Circuit Court for Northern Illinois, to recover land in that State

which had belonged originally to Tibbitts. The title which he set up, and the respective items of which he offered in evidence on the trial, was thus:

1. A deed from Tibbitts to William James, of Albany, *acknowledged as hereinafter stated.*

2. Death of this William James, and a descent to his heirs-at-law, of whom J. B. James was alleged to be one; *all asserted to be proved by a deposition of Mr. Gideon Hawley.*

3. Partition of a large body of lands in *Pike, Morgan, Adams*, and other counties in Illinois, of which the piece sued for was part, and allotment of it to this J. B. James, under proceedings in the Circuit Court of *Pike* County, Illinois; *a record from which court was offered.*

4. Death of J. B. James, and his last will, making one Dexter executor, giving power to sell real estate, with probate and letters testamentary, which will, &c., was presented in the form of a certified transcript of a *record of Adams County, Illinois, recording, in that county, a copy* (duly certified under the act of Congress,* "to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated so as to take effect in every other State") of the will, proved and registered in Albany, with the probate and letters testamentary *there* granted thereon to Dexter, as beforesaid.

5. Deed from Dexter, executor, as above mentioned, to Green, or persons through whom he claimed, for the premises demanded.

1. *As respected the first item in the title—the deed from Tibbitts to James.* The deed, *dated 3d March*, 1818, was thus acknowledged on the day of its date:

STATE OF NEW YORK, *ss:*

Be it remembered that, on the day of the date of the within deed, personally came before me the within named George Tibbitts, and acknowledged before me that he had executed the within deed freely, for the uses and purposes therein mentioned, and *consented that the same might be recorded where necessary;* and

* 1 Stat. at Large, 112; Act of May 26, 1790.

further that Zachariah Galusha, to me personally known, a subscribing witness to the execution of this deed, having been duly sworn, made oath before me that he knew the said George Tibbitts to be the same person described in and who executed the said deed, and that he was a subscribing witness to the execution thereof; all which being satisfactory to me, the said deed may therefore be recorded.

GIDEON HAWLEY,
Master in Chancery.

The defendant made objection to the deed, because:

(i) That there was no proof that the person taking the acknowledgment was really a master in chancery; and,

(ii) That a master in chancery of the State of New York had no power to take acknowledgments to deeds for lands in Illinois, and to be recorded there; a matter of course which depended on the statute laws of Illinois, and perhaps on those of New York also. The court below deemed the acknowledgment sufficient, and the deed was read.

2. *As respected the second item in the title—the death of William James and the heirship of J. B. James.* Both facts rested on the deposition of Mr. Gideon Hawley, aged seventy-two, a retired counsellor-at-law. Mr. Hawley testified to his long and intimate acquaintance with James, the ancestor, and to his death; to the fact of his leaving children, whose number and names he stated. He mentioned who of them were living, and "that the children who died prior to his decease (*as appears from entries in his family Bible, and which this deponent believes to be true*"), were J. B. James, &c.; that J. B. James, son of the said William, died in Chicago, on or about 22d May, 1856, testate as I am *informed and believe*. The deposition was objected to, because "as to the contents of the family Bible, the said Bible itself is the best evidence, and because so much of the deposition as is on information and belief is incompetent." The objection was overruled, and the deposition read.

3. *In regard to the next link—which depended on the proceedings and allotment in partition under proceedings had in the Circuit Court of Pike County.* It was not denied that the court named

had jurisdiction of matters of partition; but objection was made that it nowhere appeared that the parties, James, were properly or legally brought into court, . . . and because the bill for partition was not filed or suit brought in the county in which the greatest amount of lands lie (as required by the statute), and because publication was made in Morgan County adjoining, and not in Pike County, where the proceedings in partition were had.

By the laws of Illinois all the parties in interest were required to have notice of the application for such partition, by summons duly served, *or* by advertisement, to be published for four weeks in the nearest newspaper to the premises.*

In the case of this partition, the record on the subject of notice ran thus:

"The cause now coming on to be heard, and it appearing satisfactorily to the court that due legal notice had been given to all the defendants in this suit of the pendency of the same, by publication in the 'Illinoian,' a public newspaper printed in Jacksonville, in the County of Morgan, and State of Illinois, four weeks successively, commencing on the first day of July, A.D. 1843, and ending on the fifth day of August, A.D. 1843; and the guardian *ad litem* of the infant defendants having filed his answer, setting up no opposition to the granting of the prayer of said bill, and all the other defendants, although three times solemnly called, coming not, but making default, and summons having issued, in pursuance to law, for all the defendants in this suit, and there being no opposition to the prayer of the bill, it is ordered that the said bill be taken for confessed."

The court below allowed the record to be read.

As to the fourth and final matter—the death of J. B. James, the probate of his will, and the record produced from Adams County, Illinois. It appeared that J. B. James died leaving a will executed at Albany, New York, where he lived; that this will was admitted to probate in the Surrogate's Court of Albany

* See Revised Laws of Illinois, 1833, p. 288, §§ 13, 14, 15.

County, and letters testamentary granted by the surrogate, Dexter, who was named in it executor and trustee; that the will with its probate and letters, properly authenticated by the surrogate according to the act of Congress already mentioned—which enacts that records and judicial proceedings authenticated as it directs shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence they are taken—was recorded in Adams County, Illinois. This record from Adams County, Illinois, it was which was offered—offered, of course, as a foundation for the introduction of the fourth link in the chain of Green, the plaintiff's, title—the deed, namely, from Dexter, executor of J. B. James.

To understand the ground on which the record from Adams County, obviously not admissible on common-law principles, was offered, it is necessary to say that by statute in Illinois, passed in 1853,* entitled "An act in relation to conveyances of real estate by non-resident creditors," it was made lawful for a non-resident executor, who had proved the will of his testator and accepted the trust, in any one of the States of the Union, to execute the will in Illinois in the same manner as though he had qualified in that State. Before he could sell any real estate he was required to produce the will, or a copy of it, with the probate of it and authority to execute it, properly authenticated, and have it recorded in the County Court of that county in Illinois, where the property of the testator, or a part of it, was situated; and he was obliged to give bond for the faithful appropriation of the effects of the testator in Illinois. It was then the duty of the judge of the County Court to certify that such will was duly authenticated under the provisions of the act of the legislature.

The record from Adams County was duly authenticated. It showed that the bond which the Illinois statute of 1853 requires for "faithful appropriation" had been given by

* 2 Purple's Statutes, 1226.

Dexter; and that the judge of the County Court had made all the authentication required by the act to authorize the recording in Adams County.

The reading of this record from Adams County was objected to, because it was a record not of the original of any will, but a record of that which was but an alleged transcript of one; a copy of a copy therefore, or at best a record of a record. . . . The court below overruled the objection, and the record was read.

Two trials were had below, both resulting for the plaintiff. On exceptions to the evidence already mentioned as received, the questions here were:

1. Whether the acknowledgment of the deed to William James, before the New York master in chancery was sufficient to allow it to be read in Illinois?

2. Whether the heirship of J. B. James had been sufficiently proved?

3. Whether the court below erred in suffering the record of the proceedings in partition in Pike County to go to the jury?

4. Whether it erred in allowing to be read the record from Adams County, of the copy of J. B. James's will, proved originally in Albany, New York, and with the record of probate and the letters testamentary, certified under the act of Congress as already mentioned?

Mr. Grimes, for the plaintiff in error; Mr. Browning, contra.

Mr. Justice DAVIS delivered the opinion of the court.

1. The authentication by the master in chancery in New York of the deed to William James, when made, was in conformity to the laws of New York for the conveyance of real estate within the State. By the terms of an act concerning the proof of deeds and conveyances, passed by the legislature of New York on the 6th of April, 1801, and substantially re-enacted on the 12th of April, 1813, a master in chancery was authorized to take the proof and acknowledg

ment of deeds.* This authority remained unchanged until July 1, 1818.† After that, he was forbidden to do any official act which did not exclusively pertain to his duties as a master in the Court of Chancery. If the grantor was not known to the officer taking the acknowledgment, the law required that the deed should be proved by satisfactory evidence, and that the substance of the evidence, with the names of the witnesses, should be incorporated in the certificate of acknowledgment. All this was done in the case of this deed; and if the lands had been in New York it is certain that the deed could have been read in evidence in any of the courts of that State without further proof. What effect is to be given to such an instrument, thus authenticated, in Illinois, must of course depend wholly upon the statutes of that State; and on this point we are not left in doubt. Provision is made in an act of the legislature of Illinois‡ for the record of all deeds to lands in that State which have been executed without the State and within the United States, and have been acknowledged or proved in conformity to the laws of the State where executed. The act also declares that all such deeds, when so recorded, may be used as evidence without further proof of their execution. The deed under review, having been acknowledged and proved, as required by the laws of New York, when it was executed, was entitled to be recorded in Illinois, and was properly read in evidence. It was, indeed, insisted that there should have been some proof of the official character of the master in chancery. But neither the legislatures of New York or Illinois saw fit to require any such proof, and therefore none was necessary.§

2. As respects the deposition of Mr. Hawley, read to the jury to prove the death of William James, and the names of his heirs-at-law, the exceptions taken to it cannot be sus-

* See vol. 1 Laws of New York, published at Albany by authority in 1802, p. 478; also Revised Laws of New York of 1813, p. 369.

† See 4th vol. Laws of New York, session 1818, p. 44.

‡ Session Laws Illinois, 1847, p. 47, § 8.

§ Vance v. Schuyler, 1 Gilman, 163.

tained; for the witness really testifies to every material fact of his own knowledge, although it is competent to prove death and heirship by reputation.

3. Did the court err in suffering the record of the proceedings in partition to go to the jury?

The Circuit Court of Pike County, where a part of the real estate was situated, had jurisdiction, on proper bill or petition filed, to decree partition. All the parties in interest were required to have notice of the application for such partition, by summons duly served *or* by advertisement, to be published for four weeks in the nearest newspaper to the premises.

Such a notice was published, for the time specified, in a newspaper printed in an adjoining county, and the presumption is, that it was the nearest newspaper to the premises, in the absence of any proof to the contrary, or that a newspaper was printed in Pike County.* But the decree finds that due legal notice had been given to all the defendants, and the courts of Illinois hold that such a finding is *primâ facie* evidence of the fact, although not conclusive.† There was nothing in the record to show that the finding was not true, and the burden of proof rested on Secrist, who attacked the jurisdiction, to prove that notice in conformity with the statute was not given, notwithstanding the finding of the court.‡

The jurisdiction of the court being once established, its subsequent proceedings cannot be collaterally questioned. Secrist is a stranger to the proceedings, and does not claim under them, and can make no objection that does not go to the jurisdiction of the court. He cannot be allowed to object to a result of which the parties to the decree have not complained.§ There was enough in the record to show that the court had jurisdiction of the subject-matter and the parties; and one who was not a party to it, and seeks no rights under it, cannot complain that it does not contain the original bill or petition for partition.

* Stow v Kimball, 28 Illinois, 107. † 30 Id. 116, Goudy v. Hall.
‡ Ib. 117 § Gregg v. Forsyth, 24 Howard, 180.

We think all the objections which were taken to the introduction of this record in evidence were properly overruled by the Circuit Court.

Whether the record from Adams County—read in evidence as a foundation for the introduction of a deed from Dexter, the executor, which was a link in Green's chain of title—was properly received, depends altogether upon the laws of Illinois. In 1853, the legislature of that State provided for the conveyance of real estate by non-resident executors. The substance of the act has been stated on a preceding page.* What the act requires was done in regard to the will of Mr. J. B. James, and the record which was resisted shows that the executor complied literally with its requirements, and was authorized to execute the powers given in the will, so far as to convey real estate in Illinois. A certified copy of the record of the County Court of Adams County became, under the general laws of the State, evidence.

JUDGMENT AFFIRMED WITH COSTS.

UNITED STATES v. GOMEZ.

1. Though the general rule in cases of appeal undoubtedly is that the transcript of the record must be filed and the case docketed at the term next succeeding the appeal, yet the rule necessarily has exceptions; and where the appellant, without fault on his part, is prevented from seasonably obtaining the transcript by the fraud of the other party, or by the ill-founded order of the court below, or by the contumacy of its clerk, the rule will not apply.
2. Mandamus is the proper remedy, generally speaking, where the petition for appeal is improperly denied, and it is an appropriate remedy to compel the clerk, in case of refusal, to prepare and deliver the transcript; but where it is doubtful whether the remedy would be effectual—as where the proceedings had been such that the question as to pendency of the appeal itself, could not well be determined without an inspection of the record—a resort to it is not obligatory. In such cases

* See *supra*, p. 748.

Statement of the case.

if the suit be an appeal in a land case from the California district, in which the United States is a party, it may apply to the district attorney for a transcript; the latter as well as the clerk having power under an act of Congress of March 3, 1861, in such cases of appeal, to transcribe and certify the record to this court.

3. In proceedings under the act of March 3, 1851, for the settlement of private land claims in California, where the claimant produces neither a concession nor a grant, and does not prove that he ever had possession of the land described in his petition, the claim is rightly disallowed.
4. Where a decree was obtained by fraud, still if in form correct, it is sufficient as against the appellee to sustain the appeal, correct the error, and dispose of the case.

THIS was an appeal, by the United States, from a decree of the District Court for Southern California, under the act of March 3, 1851, to settle private land claims in California, reversing a decision of the Board of Land Commissioners, and confirming to one Vincente Gomez a claim for a tract or *rancho* called the *Panoche Grande*.

So far as the title involved in the claim of Gomez was concerned, the case could embrace nothing, of course, but the question, whether title was shown or not; whether the claim was well founded, or the reverse of it?

As respected this matter of the claim. The petition of the claimant to the governor was for a place described as Panoche Grande, of the extent of *three* square leagues. Appended to it was the customary *informe;* but there was no concession or grant, nor sufficient evidence of the issue of a title. It was asserted, but not proved, that the claimant had obtained the map in the record from the proper officer. One witness only, of several examined, alleged that he had ever seen the grant, and no possession was shown. A neighbor of Gomez, who had lived for twenty years in the vicinity of the land claimed, and had known Gomez and his father before him, had never heard, as it appeared afterwards, of Gomez having any land thereabouts. The commissioners rejected the claim. Whether the District Court, on appeal, if it had examined the case and been acting advisedly, would have done the same, can only be inferred. It did not, however, examine the case, nor act advisedly. The person who

had been the counsel of Gomez, one Ord, having become the representative at law of the United States as the district attorney for that part of California, entered into a bargain with Gomez to allow a reversal, by the District Court, of the decree of the board, and a consequent confirmation of the claim, on condition of receiving himself a portion of the land; which afterwards he did receive. By such an abuse and betrayal of his official trust, as the reporter understood the case, the decree above mentioned was obtained. So far as Gomez was concerned, therefore, whatever title he had derived no validity from the decree.

The allegation was, however, that the land was now owned by McGarrahan, who purchased it in December, 1857, after a decree of confirmation was pronounced by the court, who having had no suspicion that there was anything fraudulent in the judicial proceedings by which the title was confirmed, was not affected by Ord's fraudulent act, and who stood in the position of an innocent purchaser, without notice.

Representing this person, and desiring to get the case *dismissed* from the court, as the first step in establishing his title, *Messrs. Cushing and Stone, in his behalf*, set up that this court had no jurisdiction of the case. Urging, with what force they could on the evidence, McGarrahan's title as a *bonâ fide* purchaser for value of a title regular on its face, they set up further, pressing it strongly, that the court had no jurisdiction to entertain the appeal.

1st. Because the appeal was not taken within five years from the date of the decree.

2d. Because there was no citation.

3d. Because the appeal was not entered at the term of this court next succeeding the appeal.

4th. Because the pretended appeal, by virtue of which this entry was made, lost all its legal effect, by reason of the subsequent proceedings, in the District Court, on the part of the United States District Attorney.

5th. Because the decree appealed from was not a final decree.

To understand these grounds, a narrative must be borne

with by the reader. Its particulars are complicated and dull, perhaps, as well. The history has been once told in the reports of two years since.* But not to refer the reader for half the case to a volume which he may not have at hand, the reporter must request him to tolerate a repetition, and read it again.

The case was heard in the District Court of Southern California, *June* 5, 1857; on which day the court delivered its "opinion," confirming the claim for *three* leagues; and ordering "a *decree*" to be entered up in conformity with the *opinion*. But no decree *was* entered at that time. Was it that a thing begun in fraud found its author infirm of purpose, and was followed by irregularity? The cause did not appear. On the 7th January, 1858, a decree *in extenso* was filed, describing the land confirmed as "three" leagues. The decree ended thus:

"And it appearing that, on the *5th June*, 1857, the lands had been confirmed by the court to the said claimant, and it having been omitted to sign and enter *a decree therefor, at the date last aforesaid, it is ordered that the same be done now for then.*"

On the *4th of February* of the same year, the court ordered that the claimant "have leave to amend this decree by substituting *another* in its stead." Gomez did accordingly, on the day following, procure another decree to be entered. It was much like the other, giving the name of the tract and boundaries, as it did; describing it, however, as containing *four* leagues. This decree ended thus:

"It appearing that, heretofore, to wit, on the 5th June, 1857, &c., the claim in this case had been confirmed by the court, but that it had been omitted by the court to sign the decree of confirmation at the time the same was made. It is, therefore, further ordered by the court that the same be signed *now as then.*"

In due time, the sin of the district attorney found him out. He withdrew from the country. And on motion of

* United States v Gomez, 1 Wallace, 690.

the United States it was, on the 21st March, 1861, ordered by the court (Ogier, J., sitting),

"That all proceedings heretofore had in the cause be set aside, and the cause be put on the calendar, and set for trial *de novo*, according to law."

But, behold a new incident! Mr. Justice Ogier died. Another judge sat in his seat, and *he*, thinking that, after the lapse of a year, no power had rested with his deceased brother to alter or modify a decree, except to correct some clerical error, "with great reluctance," on the 4th August, 1862, vacated the order of March 21, made by his predecessor.

The case thus stood a decree entered on the 7th of January, 1858 (or possibly on the 5th of February following), *as of the 5th of June*, 1857.

At the same term, on the 25th August, 1862, *on motion in open court—no citation* having been issued—an appeal was allowed the United States "from the decision and *decree of this court confirming the claim of the claimant herein:*" and on the 6th October following, the district attorney, reciting that the claimant was "desirous of moving the court to set aside the order for appeal," agreed by entry made on the minutes that all proceedings should be stayed till the next term, "so as to give the claimant an opportunity to make such motion." On 1st December, 1862, a motion to vacate the appeal was made and heard, and on the 4th the order for appeal was vacated; the grounds of the order being that the decree having been entered *nunc pro tunc*, took effect as from June 5th, 1857; and not from 7th January, 1858; thus, of course, making more than five years to the 25th August, 1862, when the appeal was allowed.

And now came an episode; one of a sort rather unusual in judicial doings. The clerk of the District Court refused to give a copy of the record. The appellants, represented by Mr. Goold, of the California bar, "special counsel of the United States," *had asked* for a copy on the 10th October, after the appeal was allowed, and the clerk had promised to

give it to him. Not getting it at the promised time, he asked for it again on the 2d of December; the clerk now informed the counsel "that he had *changed his mind on the subject*, and would not prepare or deliver a transcript in said cause." Mr. Goold "offered to pay said clerk his customary fees for a transcript of said record; but said clerk persisted in his refusal to prepare one."

In anticipation, it would seem, of what was about to happen, the Congress of the United States had intervened, and on the 6th of August, 1861, passed a statute enacting:*

"That the district attorney of the United States of any district in California may transcribe and certify to the Supreme Court of the United States the records of the District Court of his proper district in all land cases wherein the United States is a party, upon which appeals have been or may be taken to the Supreme Court of the United States; and records so certified by such district attorney under his hand and filed in the Supreme Court of the United States shall be taken as true and valid transcripts to the same intent and purpose as if certified by the clerk of the proper district."

McGarrahan in turn applied, 6th April, 1863, to the District Court (Haight, J.) for an injunction on the clerk and attorney to restrain them from making out any transcript; the ground of the application being that the copy asked for was for the purpose of an appeal, and that no appeal was pending. The court refused an injunction as not a proper remedy, but—observing that no appeal was pending, or from the lapse of time ever could be taken, and that the district attorney had no power to certify copies under the act of Congress except there was one, and that his certificate would be null, accordingly—declared that procuring copies on behalf of the United States in such a case was a fraud on the government, and not to be tolerated, and that "in this case as in most litigations which had come under his observation, private parties were seeking their own ends and

* 12 Stat. at Large, 320.

conducting litigations at the expense of the United States, wherein the final result was matter of entire indifference so far as the interest of the government was concerned."

The attorney-general, Mr. Bates, in person now interposed. He wrote to the judge, and by letter sent to Mr. Gould, at San Francisco, directed him to obtain a copy, calling on the district attorney of the United States at San Francisco for any needed "aid." Provision was again made for the clerk's fees. Telegrams were sent across the continent. But it was in vain. Neither request, entreaty, demand, nor offered fees besides, procured the record.

The district attorney accordingly set to work to prepare and certify a roll himself. But the custody of rolls was not with him. They were in the power of the clerk, as had been his own sign manual and official seal. The district attorney could control the one no more than he could control the others. He happened, however, to possess copies of all the parts of the record except the transcript sent up by the late Board of Land Commissioners. Putting all in proper sequence, he prepared a transcript of a record, certifying "that the foregoing one hundred and seven pages are a full, true, and correct copy of *all* the proceedings, entries, and files in the District Court for the Southern District of California, *except* the transcript from the late board, &c., in the case of United States *v.* Gomez, No. 393, for the claim called *Panoche Grande*."

On this record the case came here, and was docketed in February, 1864.

Soon after it came the then counsel of Gomez, or of his successor in interest, made a *motion to dismiss the case*. The ground of the motion was that the court had no jurisdiction to hear and determine the same—

1. Because the five years within which an appeal can be taken had expired before the appeal was claimed and allowed.

2. Because the entry of the appeal was made without authority and had been set aside.

3. Because there was no citation.

4. Because the appeal was not seasonably prosecuted.

5. Because the transcript of the record was incomplete.

Comparing the reasons now assigned (see *supra*, p. 754) by *Messrs. Cutting & Stone*, on the regular calling of the case, for *refusing to hear*, with those just mentioned as assigned two years ago, by other counsel, in advance of regular call, on a *motion to dismiss*, the reader will perceive that they are in effect, except in the fifth one, the same reasons. And if the court on the mere motion to dismiss had deemed it best to take up and consider all the five reasons on that motion assigned, and fully and finally to dispose of each one—the fact that they had refused to dismiss the case would have been, of course, a bar to a further presentation of any of those same reasons now: as a cause for declining to hear it. But they did not deem this best. They considered the 1st, 3d, and 5th of the reasons, in the order in which they stand just preceding. Considering *them*, they declared them not well founded: holding—

1st. That the decree dated from 7th January, 1858, and not from the prior date of June 5th, 1857.

3d. That a citation was unnecessary.

5th. That the transcript certified by the district attorney was sufficient.

But on the 2d and 4th reasons assigned they said nothing: and remarked in conclusion as follows:

"In view of the *whole* case our conclusion is that the motion to dismiss the appeal must be overruled. Effect of the motion if granted would be *to leave the decree below in full force and unreversed; which is a result that at present we are not prepared to sanction. When the cause comes up upon its merits* we shall desire to hear the counsel on the question whether there is any *valid decree* in the case, and if not as to what will be the proper directions to be given in the cause. Those questions are not involved in the motion to dismiss."

The case had now "come up upon its merits;" when, interpreting the old case "as really nothing more than a declaration that the court were not then prepared to pass finally

upon the rights of the parties," the counsel for the appellee put forward all the old points again. Those already distinctly passed upon, the court did not, however, consider open. The second one it considered as disposed of by what was said about the first. And, disincumbered of a quantity of irrelative matter, by which they were surrounded and confused, the questions *now* before the court were:

1. Whether under the circumstances of this case the appeal, if a final decree, and legally taken and allowed, had been ineffective for want of seasonable prosecution; the general rule being confessedly that the transcript must be filed here and the case docketed at the term next succeeding the appeal?

2. If the appeal had not become ineffective, how did the claim stand upon merits?

3. Whether, if the decree was invalid and void, it had such vitality as that this court would sustain an appeal upon it, and reform and correct it.

Messrs. Black and Goold, for the United States.

Mr. Justice CLIFFORD delivered the opinion of the court.

Claim of the appellee, as described in his petition to the land commissioners, was for a tract of land situated in California called *Panoche Grande*, of the extent of four square leagues, and he alleged that the tract was granted to him, in the year 1844, by Governor Manuel Micheltorena. Unable to exhibit his title-papers, as required by the act of Congress upon the subject, he relied upon parol proof to show their existence, loss, and contents. Commissioners rejected the claim, and the claimant appealed to the District Court, where the claim for the whole tract was confirmed. Final decree, as amended, was entered on the fifth day of February, 1858; and on the twenty-fifth day of August, 1862, the appeal of the United States was allowed.

1. Appellants insist that the claim is utterly without merit, and that the decree of the District Court should be reversed. On the other hand, the claimant denies that this court has

jurisdiction of the cause, and contends that the appeal should be dismissed. Principal difficulty in the case grows out of certain proceedings in the cause, which have taken place since it first made its appearance in this court. Docket entries for the December Term, 1858, show that the case was first presented here at that term by the claimant, as an appeal not prosecuted, and that it was, on the production of the record, on his motion, dismissed in conformity to the rules of court for the want of prosecution. Mandate of the court dismissing the appeal was, on the eighteenth day of March following, delivered to the assignee of the claimant.

2. Nothing further was done in the cause in this court until the December Term, 1859, when the attorney-general filed a motion to rescind the decree dismissing the cause, and to revoke the mandate, basing the motion upon the ground that the decree and mandate had both been procured by misrepresentation and fraud. Minutes of the clerk, also, show that he filed his motion on the twenty-seventh day of January, 1860, and that the claimant, on the second day of March following, filed three other motions. First motion of the claimant was for mandamus to the District Court, to compel the judge to file the mandate and permit the execution of the decree confirming the claim. Second motion was for mandamus to compel the District Court to dismiss an application before it to open the decree and grant a rehearing. Third motion was for mandamus to compel the surveyor-general to survey the land confirmed by the decree. All those motions were heard at the same time, and the court overruled the several motions of the claimant, and entered a decree rescinding the decree dismissing the appeal, and revoked and cancelled the mandate as moved by the attorney-general.* Affidavits offered showed that no appeal had been taken by the United States, and that the statement that such an order had been made as was exhibited in the transcript and filed in the case was false. They showed not only that the United States had not appealed, but that a

* United States v. Gomez, 23 Howard, 326.

motion filed by their special counsel for a rehearing was still pending in the District Court. Decision of the court, therefore, was, that the appeal was not before the court when the cause was docketed and dismissed.

3. Next appearance of the cause here was at the December Term, 1863, which is the appeal now before the court. Record was filed and the cause docketed on the twenty-ninth day of February, 1864; and on the thirty-first day of March following the claimant filed a motion to dismiss the appeal, because, as therein alleged, this court had no jurisdiction "to hear and determine the same." 1. Because the five years within which an appeal can be taken, had expired before the appeal was claimed and allowed. 2. Because the entry of the appeal was made without authority, and had been set aside. 3. Because there was no citation. 4. Because the appeal was not seasonably prosecuted. 5. Because the transcript of the record was incomplete. Parties were heard upon that motion, and on the eighteenth day of April, of the same year, it was unanimously overruled.*

4. Coming to the present term of the court, the docket entries show that the motion under consideration was filed by the claimant on the ninth day of February last. He moved the court to strike out certain matters printed in the record, and requested the court to determine the fourth cause assigned in the motion of the preceding term for the dismissal of the cause, which, as he alleges, was not noticed, considered, or decided, when the motion was overruled and denied. Both branches of the motion were subsequently argued by counsel, and on the twenty-sixth day of February last the motion was overruled; but the Chief Justice, in announcing the result, remarked that the question of jurisdiction would be open when the cause should be argued upon the merits.

Since that time, the cause has been reached in the regular call of the docket, and has been fully argued on both sides. Claimant still denies the jurisdiction of the court, and the

* United States v. Gomez, 1 Wallace, 698.

counsel have reargued all the questions of jurisdiction presented for decision in the original motion to dismiss.

5. Three of those questions, to wit, the first, third, and fifth, were carefully examined and decided by this court during the same term in which the motion was filed, and it is only necessary to refer to that decision as the final determination of the court.* Special mention was not made of the second question presented in the motion, because what was said by the court, in disposing of the first question, rendered any further remarks upon that subject unnecessary. Express statement of the opinion is, that the appeal to this court was allowed on the day therein specified. But the suggestion is, that the court did not decide the fourth question presented for decision, and the suggestion, so far as it applies to the opinion of the court, is certainly well founded.

Fourth objection to the jurisdiction of the court was, that the appeal, even if legally taken and allowed, became null and void for the want of seasonable prosecution. General rule, as established by repeated decisions, undoubtedly is, that the transcript must be filed here, and the case docketed at the term next succeeding the appeal, in order to give this court jurisdiction.† Argument upon that subject is unnecessary, as the rule has been reaffirmed at this term in an opinion delivered by the Chief Justice.‡ Unless the case, therefore, falls within some exception to the general rule of practice, as derived from the act of Congress allowing appeals, the motion of the claimant must prevail.

6. Certain exceptions to that general rule are recognized and allowed, which are as well established as the rule itself. They are admitted as indispensable limitations to guard against fraud and circumvention, and to prevent a failure of justice. Where the appellant, having seasonably procured the allowance of the appeal, is prevented from obtaining the transcript by the fraud of the other party, or by the order

* United States v. Gomez, 1 Wallace, 698.

† Steamer Virginia v. West, 19 Howard, 182.

‡ Castro v. United States, *supra*, 46.

of the court, or by the contumacy of the clerk, the rule does not apply, provided it appears that the appellant was guilty of no laches, or want of diligence, in his efforts to prosecute the appeal.* Order allowing the appeal in this case was entered on the twenty-fifth day of August, 1862; but on the sixth day of October following, a stipulation was entered in the minutes, that the transcript should be withheld until the next term of that court, in order to give the claimant an opportunity to move the court to set aside the order of appeal. Such a motion was accordingly made by the claimant on the first day of the succeeding December; and on the fourth day of the same month the court directed that the order allowing the appeal should be vacated and set aside. Reason for vacating the appeal as assigned was, that the five years had expired before it was allowed, which is directly contrary to the decision of this court, and consequently must be considered as overruled.† Although the decision of the court was erroneous, still the proceedings under the motion had the effect to prevent the appellants, in the meantime, from obtaining a copy of the transcript.

Session of this court for that term commenced four days before the order of the District Court was announced, vacating the appeal. Suppose the explanatory facts stopped here, it might well be assumed that it was the conduct of the claimant and the action of the court which prevented the appellants from seasonably perfecting the appeal; but they do not, by any means, stop at that point. Appellants demanded the transcript on the tenth day of October next after the appeal was allowed, and the clerk agreed that it should be prepared and delivered. Failing to obtain it, they, on the second day of December following, again demanded it, and then, for the first time, were informed by the clerk, that he would not furnish the document. Present claimant, on the sixth day of April, 1863, instituted a proceeding in the District Court, to enjoin the clerk and district

* United States v. Booth, 21 Howard, 512.

† United States v. Gomez, 1 Wallace, 699.

attorney from making out and certifying the transcript of the record, upon the ground that the order allowing the appeal was entered without authority of law, and that the appeal had been properly revoked and set aside. Result was, that the judge refused to grant the injunction; but he reiterated his opinion that no appeal was pending, and remarked that the procuring copies for the United States, in such a case, was a fraud upon the government and was not to be tolerated.

Six times the demand was made of the clerk for the transcript, and the request, as often as it was made, was refused. Such demand was made by the special counsel of the United States, and by the district attorney, and by the authority and direction of the attorney-general. Throughout, the clerk refused to furnish the transcript; but finally consented to furnish the attorney-general a copy of each paper in the case; and those separate papers, it is understood, were appended together and duly certified by the district attorney, as appears in the record.*

7. Assuming the facts to be as stated, it is obvious that the case falls within the exception to the general rule, as recognized and established in the case of *United States* v. *Booth*, to which reference has already been made. Writ of error in that case was returnable at the December Term, 1855, and it was accompanied by a citation requiring the defendant to appear on the first day of that term. No return, however, was made at that time, and on the first day of February following, the attorney-general filed affidavits, showing that the writ of error and citation had been duly served, and that the State court had directed the clerk to make no return. Whereupon this court passed an order commanding the clerk of the State court to make the required return, and the cause was continued; but none such was ever made. Unable to procure any such return, the attorney-general was allowed, on the 27th day of February, 1857, to file the copy of the record produced when the ap-

* 12 Stat. at Large, 820.

plication was made for the writ of error, and on the sixth day of March following, the court ordered that it should have the same effect as if it had been regularly filed by the clerk. Evidently the power to retain jurisdiction in the case before the court is even better supported than it was in that case, because the transcript in this case is duly certified under a new provision in a subsequent act of Congress.*

8. Mandamus unquestionably is the proper remedy where the appeal is refused, and it is an appropriate remedy to compel the production of the transcript. Strong doubts are entertained, however, whether it would have been an adequate remedy in this case, because it is more than probable that, if the motion had been made, the affidavits showing the refusal of the clerk to furnish a copy, would have been met by counter affidavits, showing that the appeal had been vacated; and in that state of the case it would have been difficult for the court to have decided what was right and proper between the parties, without the opportunity of inspecting the record.

Grant, however, that the appellants might have had an adequate remedy in a motion to this court for a mandamus, still it is clear that they had a right, under the circumstances of this case, to invoke the benefit of the special provision in the act of Congress referred to as a cumulative means of securing their rights. Application was accordingly made to the district attorney, and he, without delay, made the certificate exhibited in the record. Conclusion therefore is, that the case, in either point of view, is regularly before the court, and all the motions to dismiss are overruled.

9. Regarding the case as regularly before the court, it becomes necessary to examine the merits of the claim. Some suspicion attaches to the claim, because it is made for four leagues of land, whereas the only document introduced in support of it, which is of the least probative force, represents the original claimant as having asked for but three leagues. Document referred to purports to be the petition of the

* 12 Stat. at Large, 320.

claimant to the governor, and there is appended to it the usual *informe;* but there is no concession or grant, nor is there any satisfactory evidence that any title of any kind was ever issued by the governor to the claimant. He states in his petition to the land commissioners, that he obtained the map in the record from the proper officers of the department; but the alleged fact is not satisfactorily proved. Four witnesses were examined by the claimant before the land commissioners, but only one of the number pretended that he had ever seen the grant, and his statements are quite too indefinite to be received as satisfactory proof.

Instead of proving possession under the grant, it is satisfactorily shown that he never occupied it at all; and it is doubtful if he ever saw the premises during the Mexican rule. Land commissioners rejected the claim, but before it came up for hearing in the District Court, his attorney had been appointed district attorney of the United States; and the proofs show that he conveyed two leagues of the land to the district attorney. Circumstances of the confirmation of the claim in the District Court are fully stated in the opinion of this court given when the mandate was revoked and recalled.* Comment upon those circumstances is unnecessary, except to say that the confirmation was fraudulently obtained.

Although the decree was fraudulently obtained, still, inasmuch as it is correct in form, it is sufficient to sustain the appeal for the purpose of correcting the error. Party who procured it cannot be allowed to object to its validity as a means of perpetuating the fraud, especially as he did not appeal from the decree.

The decree of the District Court is therefore reversed, and the cause remanded, with directions to

DISMISS THE PETITION.

* United States v. Gomez, 23 Howard, 339.

THE HERALD.

Knowledge of a recently established blockade inferred against a neutral from facts stated in the case.

APPEAL from a decree of the Circuit Court at Philadelphia condemning the Herald and cargo as prize of war, for breach of blockade in an attempted exit from Beaufort, North Carolina; in part as enemy's property, &c. The case was thus:

On the 27th April, 1861, President Lincoln, reciting the insurrectionary action which had been for some time going on in the South,* and the blockade which he had, on the 19th previous, announced of ports of South Carolina, &c.; reciting also insurrection in *North Carolina* and Virginia, proclaimed that

"An efficient blockade of the ports of those States WILL also be established."

And on the 30th of the same month Commodore Pendergrast, commanding the Home Squadron, issued the following manifesto from his flag-ship:

UNITED STATES FLAG-SHIP CUMBERLAND,
OFF FORTRESS MONROE, VA., April 30, 1861.

To all whom it may concern:

I hereby call attention to the proclamation of his Excellency, Abraham Lincoln, President of the United States, under date of April 27, 1861, for an efficient "blockade" of the ports of Virginia and North Carolina, and warn all persons interested that I have a sufficient naval force HERE for the purpose of carrying out that proclamation.

All vessels passing the capes of Virginia, coming from a distance, and ignorant of the proclamation, will be warned off; and those passing Fortress Monroe will be required to anchor under the guns of the fort, and subject themselves to an examination.

G. J. PENDERGRAST,
Commanding the Home Squadron.

* The firing on Sumter was on the 12th of April, 1861.

In this state of public announcements, emanating as mentioned, the "Herald," a British built, and originally a wholly British owned vessel, arrived at Boston on the 20th May, 1861. She carried a British register and a British flag. A portion of her was owned, however, by De Wolf, a merchant of New York. This interest, acquired in 1854, was never registered, nor was it evidenced by any proprietary document.

On May 24, 1861, while lying in Boston harbor, the vessel was, as alleged, chartered, through the master, to a Mr. Williams, a citizen of the United States and a resident merchant of New York, for a voyage from Boston to *Beaufort*, and *thence to Liverpool*. Three copies of the charter appear to have been executed by the master.

Having effected this charter with Williams at New York, the master returned to Boston, and cleared his vessel at the custom-house there for Turk's Island. "The reasons why I cleared for Turk's Island," said the master after capture, "were, that I did not wish my crew to know that I intended to go to a Southern port; and I also designed, *in case I found Beaufort blockaded*, to go next to Turk's Island for a cargo."

With this clearance on board, the "Herald," on the 25th of May, set sail from Boston, without cargo, and arrived at Beaufort very early on the morning of the 9th of June. The master did not go in on arriving. He gave this account:

"The *wind being then off shore*, I hauled the brig up by the wind and fetched in close to the land, about twenty miles to the southward of Beaufort harbor, and then I tacked and stood off and on all that, the ninth day of June, till about seven or eight o'clock P.M., when and because the wind was ahead, *and the lights at the entrance of the harbor being out*, I anchored about seven miles to the southward of the entrance to Beaufort harbor, where I remained till about half-past *one o'clock on the next morning*, when, the wind being more favorable, I got under way and stood up towards Beaufort harbor; and on my way up, *the morning being dark*, I ran aground. I got off again, and proceeded up towards the harbor till daylight. Soon after I hove

to, and set the English ensign at the fore as the signal for a pilot, who, in about half an hour, came alongside, and of whom I then asked if the port was or had been blockaded; and he answered me *that it had not been and was not*, and that no vessel of war had been seen off that port."

He immediately reported his arrival to a Mr. Charles Parmlee, of Goldsboro, North Carolina, and delivered to him a sealed letter which he had received in New York from Mr. Williams, the charterer. Its contents could only be inferred by the court. Under the direction of Mr Parmlee and his brother a cargo consisting wholly of the staples of North Carolina—turpentine, tar, rosin, tobacco &c.—was shipped; a portion of it consigned by Parmlee, as "*agent*," to the consignees of the vessel at Liverpool, and the rest by various shippers of Newbern, Wilmington, Beaufort, and Petersburg, places in North Carolina then in war against the United States, to Fraser, Trenholm & Co., and W. A. and G. Maxwell & Co., of Liverpool; firms, the former by distinction, in close and active complicity with the rebel enemies of the United States.*

The vessel remained at Beaufort about a month, taking in a cargo there, and at Morehead City, and meeting some opposition, as the captain testified, from the civil and military persons then in control, and who, he stated, supposed that the cargo might belong to merchants in the North, and contemplated a seizure of it. He sailed for Liverpool July 14th got fairly out to sea—a hundred and forty-five miles from Beaufort—testifying that it was not till then that "he saw or heard of any blockade or blockading vessel." He then heard of it; being captured. *He had no copy of the charter aboard.* On his examination *in preparatorio*, while saying that he "had seen no blockade yet," he added:

"About three weeks before I came out of Beaufort I saw what I supposed to be a man-of-war, from the tops of the buildings I saw two spars, but no hull, with a glass, and saw she was standing to the northward, almost a week before sailing. The

* See The Bermuda, *supra*, 517.

British ship Gladiator came near the bar. These are all the men-of-war I saw before the capture."

A ship-hand, Homer, said that he knew no cause why the vessel had been captured, other than that she came out of a Southern port. Interrogated as to what vessels he had seen, and what notice was given, he added:

"During the time we were lying at Beaufort, I saw three different men-of-war off the harbor; and during the last two weeks we were there I saw a man-of-war as often as once in three days. No notice or warning, as far as I know, was given to the captured vessel."

The mate of the vessel testified—

"I suppose we were captured because we sailed from a Southern port; but we saw no blockading force off Beaufort. *It was reported three times* from Fort Macon that a man-of-war was off the harbor, but I *only saw one* while we were lying there."

A letter, from which what follows are extracts, found on the Herald, gave some information on the same matter:

BEAUFORT, July 11, 1861.

MESSRS. FRASER, TRENHOLM & Co., Liverpool:

GENTLEMEN: We take the liberty of addressing you these lines, as our country has become divided into North and South, and we, *as full-blooded Southerners*, shall carry this matter out.

Formerly our business has been done principally by New York merchants. We have dealt with them and owned vessels together, and have no fault to find with them directly, *only* they are North and we are South. Circumstances have changed, and we, as well as a great many of our Southern friends, intend to change our business.

We are carrying on the distillery business, and buying spirits, and hope soon to have the chance of making you a good shipment from this place. T. Thomas and ourselves have on board the Herald ninety casks of spirits shipped to you.

There is a great chance here for any English vessel that comes and *can get in to this place clear of the Federal men-of-war*. When they fall in with an English vessel bound to a Southern port

they *only* order them off, and not let them enter. There is no blockade at this place that can be considered *as such* up to this time. There has been but one steamer, off this place, near enough to see the hull, and no time near enough to tell what she was by her colors. *There has been a smoke seen off in the offing at one time, and it was thought to be one of the blockading squadron;* can't say whether it was one or not. I see no difficulty for your vessels; if they should be ordered off, they could go elsewhere, *and if they get in they can get a splendid freight.*

Very respectfully, yours, &c.,

THOMAS DUNCAN & Co.

The libel demanded the forfeiture of the brig and cargo as prize of war. The master prayed restoration of the vessel in behalf of six alleged owners, all British subjects, of whom five were domiciled in Nova Scotia, and one in New York. He also prayed restitution of a part of the cargo, which consisted wholly of turpentine, tar, rosin, and tobacco, products of North Carolina or Virginia, in behalf of owners living in North Carolina; and of another part, in behalf of persons believed to have an interest, residing in New York, South Carolina, and in England. Restitution of the rest of the cargo was claimed by Williams, already mentioned as a merchant, native and resident of New York. *No proof of ownership of cargo was made*, except in behalf of Williams and the parties living in North Carolina.

Condemned, as already mentioned, by Grier, J., the case was now here for review.

Mr. Assistant Attorney-General Ashton, for the United States; Mr. Donnohue, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The principal question in this case is, was the brig lawful prize? She was a neutral vessel, and the answer to the question must depend on her employment at the time of capture.

The actual establishment of the effective blockade of the

ports of North Carolina, in pursuance of the President's proclamation of the 27th of April, 1861, was notified by Commodore Prendergast on the 30th April; and it is a matter of history that the notification, as well as the proclamation, became at once well known throughout the country. It is impossible to believe that the master of the Herald, at Boston, on the 22d May, could have been ignorant of facts so notorious. His conduct on arrival near Beaufort strongly indicates his apprehension of capture. The lights at the entrance of the harbor had been destroyed by the insurgents, and yet, though arriving in the morning of the 9th, he lay off and on, some twenty miles south, all that day, and went in during the succeeding night.

We know of no case of prize in which a captured vessel has been restored under such circumstances; but we need not rest the decision of this case upon this evidence of attempt to enter a blockaded port.

The vessel, when once within the harbor, proceeded to take in a cargo. Some difficulties were encountered from the action of the rebel military authorities, and from the disturbed condition of the country; but the lading was at length completed, and the vessel sailed, as already stated.

During the month which elapsed from arrival till departure, the effectiveness and stringency of the blockade were materially increased. The master, it is true, asserts that he still remained ignorant of its existence; but the evidence shows that it was the common topic of conversation in Beaufort and Morehead City; and he says himself that, while he was taking in cargo, about three weeks before sailing, he saw from the tops of the buildings, with a glass, a man-of-war off the harbor. It remained there, for he saw the same vessel about one week before sailing. Another witness, a hand on the brig, says, during the time the vessel was lying at Beaufort, he saw three different men-of-war off the harbor; and during the last two weeks he saw a man-of-war as often as once in three days. A letter from one of the shippers of the cargo, found on the brig, informs his correspondent that "a smoke had been seen off in the

offing at one time, and it was thought to be one of the blockading squadron."

It would be difficult to make more conclusive proof of the existence of the blockade, or of notice of the fact to the master of the captured vessel.

The cargo was shipped to be conveyed from the port by this brig, and was in the same offence.

The facts of the case supply other grounds of condemnation. The shares of the vessel owned in New York, and the portions of the cargo belonging to Williams, of New York, might be condemned for trading with the enemy; and other portions of the cargo might be condemned as enemy's property; but it is enough that vessel and cargo were equally involved in the attempt to violate the blockade. Both were rightfully captured.

DECREE AFFIRMED.

DEHON v. BERNAL.

1. When the United States and the claimant to whom a Mexican grant has been confirmed are both satisfied with its location, any other person who seeks to contest such a location must show some title, legal or equitable, to some part of the land covered by the survey, before the court will disturb it at his instance, or in his alleged interest.
2. When all the elements of location prescribed by a decree of the District Court cannot possibly be complied with, and a survey conforms as much with the decree confirming the grant as it can well be made to do, this court will not disturb it.

APPEAL from a decree of the District Court of the United States for the Northern District of California, confirming a survey of a Mexican grant.

The appeal was not taken by the United States, nor by the claimant whose grant was confirmed, but by one Dehon, who was permitted to intervene in the District Court, on the ground that the survey covered land in which he was in-

terested. He asserted that the survey covered land owned by him under a deed from Bishop Allemany. The Allemany grant had been confirmed, surveyed, and patented, and was found to cover a part of this survey as first made. To the extent of the interference, the District Court modified this survey. But the intervenor was still dissatisfied, and appealed to this court, because, as he said, it covers other land which he claims, and also because it was erroneously located.

While exhibiting a number of deeds, Dehon, however, did not show any interest in the land covered by the modified survey, derived either from the government of Mexico or that of the United States.

The decree confirming the grant described the lot as a lot two hundred varas square, lying *on* the south *side* of an arroyo or stream, sixty varas from the northwestern corner of the Mission of Dolores; the northeast corner of the lot being one hundred and fifty varas from the northeast corner of the Mission. The arroyo was found, and the Mission is well known. It was *impossible*, however, so to locate the lot as to make the arroyo its northern boundary, and bring its northeast corner within any reasonable approximation to the distance stated from the northeast corner of the Mission. Under these circumstances, the surveyor located it so that the northeast corner of the lot was one hundred and sixty-one varas from the northeast corner of the Mission, and the lot was fifty-five varas from the northwest corner of the Mission. This placed the northern boundary of the lot some distance south of the arroyo.

Mr. D. B. Eaton for the appellant; Mr. Cope, contra.

Mr. Justice MILLER delivered the opinion of the court.

1. When the United States and the claimant to whom a Mexican grant has been confirmed are both satisfied with its location, we think that any other person who seeks to contest such a location must show some title, legal or equitable, to some part of the land covered by the survey, before the

court will disturb it at his instance. And though the District Court may, upon slight showing, permit a person to intervene to protect any interest he may have, we are of opinion that, on the hearing, he must show some title, legal or equitable, to the land in dispute, before the court is justified in disturbing the survey in his interest. In the present case, the court did modify the survey, so as to exclude all the land to which the appellant showed such title.

2. The survey conforms as nearly to the decree confirming the grant as it can well be made to do. It is true that the location as made by the surveyor places the northern boundary of the lot some distance south of the arroyo; but, as all the prescribed elements of location cannot be complied with, we do not see how it can be located more in conformity with the decree than it is.

And as the appellant has not shown that he is prejudiced by the survey as it is confirmed by the District Court, its decree is

AFFIRMED WITH COSTS.

THE MILITARY COMMISSIONS CASES.

THESE cases, *Ex parte Milligan, &c.*, were disposed of, as is known, on the last day of this term: but the delivery of opinions was necessarily deferred till the next session. On this account, a report, too, is carried over.

APPENDIX.

No. I.

(*See page* 100.)

THE remarks of Mr. Senator Stewart, of Nevada, referred to in a note on this page, were originally contained in a public letter, I think, to his fellow Senator, Mr. Ramsey, of Minnesota. They have since been made in nearly the following form to the Senate of the United States:

"Upon the discovery of gold in California, in 1848, a large emigration of young men immediately rushed to that modern Ophir. These people, numbering in a few months hundreds of thousands, on arriving at their future home found no laws governing the possession and occupation of mines but the common law of right, which Americans alone are educated to administer. They were forced by the very necessity of the case to make laws for themselves. The reason and justice of the laws they formed challenge the admiration of all who investigate them. Each mining district, in an area extending over not less than fifty thousand square miles, formed its own rules and adopted its own customs. The similarity of these rules and customs throughout the entire mining region was so great as to attain all the beneficial results of well-digested, general laws. These regulations were thoroughly democratic in their character, guarding against every form of monopoly, and requiring continued work and occupation in good faith to constitute a valid possession.

"After the admission of California as a State, in September, 1850, Mr. Frémont, then Senator from that State, introduced a bill, the purpose of which was to establish police regulations in the mines. It imposed a small tax upon the miners to defray the expenses of the system. Many Senators, when the bill came up for discussion, expressed the opinion that the mines ought to be sold, or some means devised by which a direct revenue might be obtained from that source. Various amendments were offered to effect these purposes. But Mr. Benton took a leading part in the discussion, and contended throughout that good policy required that the mines should remain free and open for exploration and development. Mr. Seward sustained Mr. Benton.

"The arguments of Senators in favor of free mining finally prevailed, and all amendments looking to sale or direct revenue were voted down; and the bill finally passed the Senate, without material amendment, in its original form, but failed in the House from want of time to consider it. Before the meeting of the next Congress the fact became known that the miners themselves had adopted local rules for their own government, which rendered action on the

part of Congress unnecessary; and from that time to the present non-action has been the policy of the Government, with one single exception. The solemn declaration, however, just mentioned, on the part of the Senate, in favor of a just and liberal policy to the miners, was hailed by them as a practical recognition of their possessory rights, and greatly encouraged and stimulated mining enterprise, and laid the foundation for a system of local government now in full force over a vast region of country, inhabited by near a million men.

"The legislature of California, at their following session, in 1851, had under consideration the subject of legislating for the mines, and, after full and careful investigation, wisely concluded to declare that the rules and regulations of the miners themselves might be offered in evidence in all controversies respecting mining claims, and when not in conflict with the constitution or laws of the State, or of the United States, should govern the decision of the action. A series of wise judicial decisions moulded these regulations and customs into a comprehensive system of COMMON LAW, embracing not only mining law (properly speaking), but also regulating the use of water for mining purposes. The same system has spread over all the interior States and Territories where mines have been found, as far east as the Missouri River. The miner's law is a part of the miner's nature; he made it, and he loves it, trusts it, and obeys it. He has given the toil of his life to discover wealth, which, when found, is protected by no higher law than that enacted by himself, under the implied sanction of a just and generous Government. Miners, as a community, devote three-fourths of their aggregate labor to exploration, and consequently are, and ever will remain, poor, while individuals amass large fortunes, and the treasury of the world is augmented and replenished.

"Persons who have not given this subject special attention can hardly realize the wonderful results of this system of free mining. The incentive to the pioneer held out by the reward of a gold or silver mine, if he can find one, is magical upon the sanguine temperament of the prospector. For near a quarter of a century a race of men, constituting a majority by far of all the miners of the West, patient of toil, hopeful of success, deprived of the associations of home and family, have devoted themselves, with untiring energy, to sinking deep shafts, running tunnels thousands of feet in solid granite, traversing deserts, climbing mountains, and enduring every conceivable hardship and privation, exploring for mines, all founded upon the idea that no change would be made in this system that would deprive them of their hard-earned treasure. Some of these have found valuable mines, and a sure prospect of wealth and comfort when the appliances of capital and machinery shall be brought to their aid. Others have received no compensation but anticipation—no reward but hope.

"While these people have done little for themselves, they have done valuable service for this Government. They have enhanced the value of the property of the nation near one hundred per cent.; have converted that vast unknown region, extending from British Columbia on the north to Mexico on the south, and from the eastern slope of the Rocky Mountains to the western decline of the Sierra Nevada, into the great gold and silver fields of the United

States, surpassing in richness and extent the mines of any other nation on the globe. I assert, and no one familiar with the subject will question the fact, that the sand plains, alkaline deserts, and dreary mountains of rocks and sage brush of the great interior, would have been as worthless to-day as when they were marked by geographers as the great American desert, but for this system of free mining fostered by our neglect, and matured and perfected by our generous inaction. No miner has ever doubted the continued good faith of the Government, but has put his trust in its justice and liberality, traversing mountain and desert as incessantly and as hopefully as the farmer of the West has ploughed his field. What he now occupies he has discovered and added to the wealth of the nation.

"This good faith of the Government (promised, as it were, by the action of the Senate sixteen years ago) not only inspired enterprise, and led to discoveries the magnitude and importance of which cannot be overestimated, but in the time of the severest trials of the Union, no people were more loyal than the miners. They lost no opportunity to enlist in your armies, or contribute to the support of the Government. Their liberal donation to the sanitary fund was but a slight manifestation of their deep love of the Union, and sympathy for its suffering heroes. The little town in which I reside contributed in gold coin over $112,000, being at the time about thirty dollars to each voting inhabitant; and a like liberality was displayed by the whole coast. The people are truly grateful to a generous Government, and time seems to have strengthened the regard they feel for their native land and their early homes. But they look with jealous eyes upon every proposition for the sale of the mines which they have discovered and made valuable. Any public man who advocates it, with whatever motive, is liable to be condemned and discarded as an unfaithful servant. The reason for this is obvious. It is their all, secured through long years of incessant toil and privation, and they associate any sale with a sale at auction, where capital is to compete with poverty; fraud and intrigue with truth and honesty. It is not because they do not desire a fee-simple title, for this they would prize above all else; but most of them are poor, and unable to purchase in competition with capitalists and speculators, which the adoption of any plan heretofore proposed would compel them to do; and for these reasons the opposition to the sale of the mineral lands has been unanimous in the mining States and Territories.

"To extend the pre-emption system—applicable to agricultural lands—to mines is absurd and impossible. Nature does not deposit the precious metals in rectangular forms, descending between perpendicular lines into the earth, but in veins or lodes, varying from one foot to three hundred feet in width, dipping from a perpendicular from one to eighty degrees, and coursing through mountains and ravines at nearly every point of the compass. In exploring for vein mines, it is a vein or lode that is discovered, not a quarter section of land marked by surveyed boundaries. In working a vein more or less land is required, depending upon its size, course, dip, and a great variety of other circumstances, not possible to provide for in passing general laws. Sometimes these veins are found in groups, within a few feet of each other, and dipping into the earth at an angle of from thirty to fifty degrees, as at Freiberg, in

Saxony, or Austin, in Nevada. In such case a person buying a single acre in a rectangular form would have several mines at the surface, and none at five hundred or a thousand feet in depth. With such a division of a mine, one owning it at the surface, another at a greater depth, neither would be justified in expending money in costly machinery, deep shafts, and long tunnels, for the working of the same. Nor will it do to sell the land in advance of discovery, for this would stop explorations, and practically limit our mining wealth to the mines already found, for no one would 'prospect' with much energy upon the land of another, and land speculators never find mines. The mineral lands must remain open and free to exploration and development; and while this policy is pursued our mineral resources are inexhaustible. There is room enough for every prospector who wishes to try his luck in hunting for new mines for a thousand years of exploration, and yet there will be plenty of mines undiscovered. It would be a national calamity to adopt any system that would close that region to the prospector.

"The question then presents itself, how shall the Government give title, so important for permanent prosperity, and avoid these intolerable evils? I answer, there is but one mode, and that is to assure the title to those who now or hereafter may occupy according to local rules, suited to the character of the mines and the circumstances of each mining district. In the increasing agitation of the subject by the introduction into Congress of bills which miners regard as a system of confiscation, and which tend to destroy all confidence in mining titles, we now need statutes which shall continue the system of free mining, and hold the mineral lands open to exploration and occupation, subject to legislation by Congress and local rules; something which recognizes the obligation of the Government to respect private rights which have grown up under its tacit consent and approval, and which shall be in harmony with the legislation of 1865, protecting possessory rights, irrespective of any paramount interest of the United States. The system will be in harmony with the rules of property as understood by a million men, with the legislation of nine States and Territories, with a course of judicial decisions extending over near a quarter of a century, and finally ratified and confirmed by the SUPREME COURT OF THE UNITED STATES; in harmony, in short, with justice and good policy."

A system such as the eloquent Senator conceived to be accordant with these ideas was introduced by him to the Senate in June, 1866. (*See the "Daily Globe" of June* 19, 1866.)

No. II.

(*See page* 562.

PHILADELPHIA, March 27, 1866.

DEAR SIR: You are good enough to write to me that, in reporting a case in the Supreme Court at Washington, you would like to know the true value of the franc of France, and that you find yourself a little confused by appa-

rently more than one value being assigned to it. With terms of confidence in my knowledge of these things for which I thank you, you ask me how the matter stands. It gives me pleasure to inform you.

1. The custom-house value of the franc of France and Belgium is made by act of Congress, 18 cents, 6 mills.*

2. Previous to the passage of the act of February 21, 1857, certain foreign gold and silver coins, among which were the coins of France, were made a legal tender at a valuation, per pennyweight, dependent upon the report of the Director of the Mint as to their *weight* and *fineness*. In one of my first reports, as Director of the Mint, I recommended the repeal of all laws making foreign coins a legal tender.† In subsequent reports I repeated the suggestion, which led to the passage of the above-cited act of February, 1857; and now (by the third section of that act) foreign gold and silver coins are not "current" as money, nor a *legal tender*. But the section cited makes it the duty of the Director of the Mint to cause assays to be made from time to time of such foreign coins as may be known to our commerce, to determine their average weight, fineness, and value, and report the same in his annual Mint Report to the Secretary of the Treasury.

3. The last Mint Report‡ makes the five franc piece of silver worth 98 cents. At this rate, the franc of silver is worth 19 cents, 6 mills. This valuation is founded upon the *purchasing* price of silver at the Federal Mint, namely: 122 cents, 5 mills, per oz. troy. It will be noted that under the act of February 21, 1853,§ the silver half dollar and lower denominations are reduced in *weight* as compared with the *silver dollar*, and are only a legal tender to the amount of five dollars.

4. There is also in the report just cited (p. 248) a statement of the valuation of the *gold* franc, thus:

	Cents.	Mills.
20 franc piece, *new*, full weight,	385	83
" " " worn, average weight,	384	69
At this rate, the gold franc stands, as you will see—		
When new, and of full weight,	19	27
When worn by circulation, average weight,	19	23
It is thus demonstrated that there are three valuations of the franc of France:		
1. Custom-house valuation,	18	6
2. Silver franc, Mint price,	19	6
3. Gold, new, full weight,	19	27
3. " worn, average value,	19	23

I am, with great respect,

Your friend and obedient servant,

JAMES ROSS SNOWDEN.

To the Reporter of the Supreme Court of the United States,
Washington, D. C.

* Act of May 22, 1846; 9 Stats. at Large, 14.

† See letter to the Secretary of the Treasury, January 28, 1854; 33d cng., 1st Session; House of Reps., Ex. Doc. No. 68, p. 23.

‡ Found in the "Finance Report" for 1855, p. 24*e*.

§ 1 Stats. at Large, 160.

No. III.

(*See page* 721.)

[From the MS. of 3d Wallace, Jr.]

The Passaic Bridges.

The Constitution gives to Congress power "to regulate commerce with foreign nations, and among the several States."

With this clause in force, as the supreme law of the land, Milnor and others, *citizens of New York, and owning wharves in the city of Newark, New Jersey*, but not navigators, pilots, or anything of that sort, filed their bills in the Circuit Court of the State just named to restrain the New Jersey Railroad Company and others from erecting two certain bridges over the Passaic, one in the city of Newark, at a point called the Commercial Dock; the other at a point about two and a half miles below the wharves of the town. This company's road forms a link in the chain of roads which connects New York with Philadelphia, and so the North and South. The company had been for many years running its trains over a bridge at the upper end of the town; but in crossing the river at that point they were obliged to make their road describe a curve, much in the shape of an S, carrying it, moreover, through populous parts of the city, and causing, as they said, delays and dangers. The purpose of the new bridges was, therefore, to shorten and straighten the road.

The complainants sought the injunction on the ground:

1st. That the Passaic River was a public highway of commerce, which, under the Constitution of the United States, has been regulated by Congress.

2d. That the free navigation of the river as a common highway having been established by regulation of Congress, and by compact between the States, it could not lawfully be obstructed by force of any State authority or legislation.

3d. That the bridges proposed to be erected would be each an obstruction to the free navigation of the river, and public nuisances.

The Passaic, it appeared, was *a river having its springs, course, and outlet wholly in New Jersey*. Though a small and narrow river, it is navigable for sloops, schooners, and the smaller class of steamboats, as far as the tide flows, which is some distance above Newark. At the upper end, above the city, there were several bridges with small draws, and difficult to pass, all of which were erected by authority of the State, and one of them more than fifty years ago. The city had been made a port of entry by act of Congress, and the United States had surveyed the channel, built two lighthouses, "fog-lights," spar-buoys, &c. The city had some little foreign commerce, and some with ports of other States; but vastly the largest portion of it all was with New York, to which it had become, in some sort, a manufacturing suburb, and nearly all this was carried on by the railroad, whose contemplated bridges the bill now sought to restrain.

The bridges in controversy were authorized to be erected by statute of the State of New Jersey. They were required by this statute to have pivot-draws,

leaving two passages of sixty-five feet each for the passage of vessels navigating the river.

As to their effects on the navigation, the complainants brought a large number of wharf owners, captains of sloops, schooners, and of little steamboats, who gave it, as their "opinion," that the bridges could not be erected without obstructing the navigation by the detention of ice, and by causing bars and shoals in the river, and without subjecting sailing vessels, especially, to a detention for a change of tide and wind, or for daylight, and to inconveniences and hazards generally; while it would probably subject wharf property above the bridges to a depreciation of from twenty-five to fifty per cent., break up a system of tow-boats that had got established in that river, and raise the price of freights; since "you can't get no man to go through these bridges without extra pay; they all have such a dread of bridges, which, if there are currents, frequently break sails and rigging, and sometimes injure their hulls."

But the case did not thus strike everybody. The Railroad Company proved, or brought witnesses to prove, that "not only would the proposed bridge offer no material obstruction to navigation, but, by replacing the present bridge at Centre Street, *would actually improve the general navigation of the river, and enhance the general value of wharf property on the river*, and by effecting the removal of the railroad track now running in rear of *the intermediate wharves, would result in very little, if any, damage to any of them.*"

As respected the advantages to the railroad, and the improved safety to travellers, while the complainants admitted that the road was a great thoroughfare, and that crossing on the old bridge obliged the trains to make a curve, they denied that the curve caused delay or danger to the road, or that any new track was necessary. They showed that the road had been very profitable, making for years dividends of not less than ten to fifteen per cent., while, on the subject of accident, they cited the Report of the directors to the stockholders for 1853 and 1854, in the former of which the directors say, with a spirit of piety which left no doubt that they spoke the truth:

"It is a subject for thankfulness and praise to the Almighty Governor of the universe, that on this 21st anniversary, the board are enabled to announce the fact, that although—including commuters and others—more than 13,000,000 of persons have been transported on the road, no person within the cars has suffered in life or limb."

While in the latter they continue in the same strain of gratitude and sense of obligation:

"The exemption from serious accidents which has attended the operations of the company during the past year is cause of sincere thankfulness. The gratifying record that no person transported on the road has been injured in life or limb, while in the cars, is still true, though the whole number of passengers since the opening of the road exceeds 15,000,000. Such favorable results, while they entitle those having charge of the condition of the road and the running of the trains to high commendation for their vigilance and care, also increase our obligations to a kind, protecting Providence.

"No doubt is entertained that the net earnings will be ample for the cash dividend of ten per cent. per annum, and a handsome surplus applicable to such construction as shall increase the value and usefulness of our work."

For the complainants: The case of *Pennsylvania* v. *Wheeling Bridge** governs this. In that case, the Bridge Company, under authority from the legislature of Virginia, undertook to erect a bridge over the Ohio at Wheeling. The Ohio at this point was wholly in her own State. She erected the bridge; when erected, it did not destroy the navigation at all, though it impeded it somewhat, rendering it less free. The State of Pennsylvania, having large canals and railways terminating on the Ohio, and which, she represented, had been built with direct reference to free navigation of that river, filed her bill to abate the bridge *as a nuisance*. Her allegation was, indeed, that the bridge had been built "under color of an act of the legislature of Virginia, but in direct violation of its terms." The legislature of Virginia, however, passed at once an act declaring that the bridge as constructed was constructed "in conformity with the intent and meaning of the charter." The bridge as erected existed, therefore, under the authority of the State. It was constructed under skilful engineers, and no otherwise impeded navigation probably than any bridge in any large river generally impedes navigation; rendering it less free. Most steamers with stiff smoke-pipes would have been able to pass as it was; any steamer with flexible pipes—pipes on hinges—could certainly have done so.

The court, however, declared that the bridge was a *nuisance*, and directed it to be abated, unless so raised and altered as to leave the navigation *wholly* free. Yet this bridge was a connecting bond of a great highway; it was itself a highway, at once intra-territorial, and leading to intercourse between the States. But the fact that it was *below a port of entry, Pittsburgh, was fatal to it.*

McLean, J., giving the opinion of the court, in which he places reliance on the fact that the bridge *was* erected below a port of entry, says:

"The fact that the bridge constitutes a nuisance is ascertained by measurement. If obstruction exists, it is a nuisance. An indictment at common law could not be sustained in the Federal courts by the United States against the bridge as a nuisance, as no such procedure has been authorized by Congress; but a proceeding on the ground of a private and irreparable injury may be sustained against it by an individual or a corporation. Such a proceeding is common to the Federal courts, and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out the same as in a public prosecution. . . . The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named."

In *Devoe* v. *The Penrose Ferry Bridge Company*,† which was a bill to enjoin a bridge below Philadelphia, over the Schuylkill, a river much small er and shallower than this—like it, wholly in one State—far more than it, in its history, the subject of regulation by the State in which it lies—a stream eminent for the finny tribes which haunt the sedge and ooze, but not whitened in its muddy sloth by sails of commerce—a stream bridged everywhere *at* the city—in regard to which Congress may be said never to have legislated—

* 13 Howard, 519.

† 3 American Law Register, 33.

Grier, J., granted an injunction to stay a bridge about to be erected under the authority of the Commonwealth of Pennsylvania. The court there said:

"The jurisdiction in cases like the present has been fully considered and decided in the *State of Pennsylvania* v. *The Wheeling Bridge*. The court is not at liberty, even if so disposed, to disregard the authority of that case. It is there decided that, although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a State, yet that, as courts of chancery, they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a State."

And the court even went out of its way to add, on the authority of the Wheeling Bridge Case, that the commerce on the Schuylkill below the port of Philadelphia was entitled to as much protection as that of the Ohio, Mississippi, Delaware, or the Hudson.

For the defendants: Granting to the Wheeling Bridge Case the fullest weight, it is no precedent for this.

The jurisdiction there exercised was invoked upon the proposition that "the River Ohio is a highway of commerce, regulated by Congress." That river is an enormous river, forms the boundary of six States, and is navigable through them and four other States for a thousand miles. State laws had not regulated it at any time, except to make it free, while it had been regulated by Congress in every way. By the Ordinance of 1787, its waters had been declared to be common highways, and forever "free." Virginia had, in 1789, when desiring that Kentucky should be admitted into the Union, declared that its navigation should be "free and common to all citizens of the United States," to which act Congress assented; and it thenceforth became a compact between Virginia and all other States. Successive appropriations were made by Congress for the removal of obstructions to its navigation; and, finally, when Virginia applied in four several instances—1836, '37, '38, and '43—for the passage of a law to authorize the construction of a bridge at Wheeling, she met in each case with refusal. We refer to these facts, being public ones. The "regulation" by Congress had, therefore, been made, as we have said, "in every way"—by what that body did, and by what it prevented—made affirmatively, and made negatively.

Now as respects the Passaic, in the first place its character and geographical position are wholly different from that of the Ohio. It is a very small stream; it rises, flows, and discharges itself within one State—a small one. No question can arise from its flowing through or past any other State. Then, no regulation of Congress worth naming has ever touched it, while the State in which it lies, and whose river it is, has exercised an early and continued control over it.

The remarks about nuisance made by McLean, J., in giving the opinion of the court, are extra-judicial. They have tended perhaps to mislead the professional mind; certainly, they were unnecessary to the decision of the cause, and if meant to be applied to the case of a bridge authorized by statute, and built according to the statute, are not well founded in law. The fact that a

bridge is below a port of entry does not necessarily make it a nuisance; nor was that the point adjudged in the Wheeling Bridge Case.

The case before the court bears far greater, and indeed a close analogy to *Wilson* v. *Blackbird Creek Company*.* Blackbird Creek was "one of those many creeks passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance." Under incorporation from the State of Delaware, certain persons, to increase the value of property along its banks, and to improve the health of the region by draining the marsh, erected a dam. This dam Wilson broke down; and on trespass brought against him by the Company, the question was, whether the authorization of the dam was void as repugnant to the Constitution, the counsel for the company arguing that it came in conflict with the power of the United States "to regulate commerce with foreign nations and among the several States." The court held, unanimously, that it was not repugnant to the Constitution. Marshall, C., J., giving his opinion, says:

"The value of property on the banks of the creek must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the General Government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgment, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of the State and its citizens, of which this court can take no cognizance. If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, *the object of which was to control State legislation over those small navigable creeks into which the tide flows*, and which abound throughout the lower country of the Middle and Southern States, we should not feel much difficulty in saying that a State law coming in conflict with *such* an act would be void; but Congress has passed no such act. We do not think that the act can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

This great Chief Justice does here admit that it is not every obstruction of every navigable stream by the State, nor even the complete stoppage by it of some navigable streams, which will constitute an interference with the constitutional power of Congress to regulate commerce. He speaks of the matter as a relative question, and says that, "under all the *circumstances* of the case," the act of the State could not be considered as such an interference. This relative character of this class of questions is what we maintain. He admits impliedly, too, that it is not every act of Congress legislating about a stream which will be a regulation of commerce in regard to it. "Had Congress passed an act the object of which was to *control State legislation* over these small navigable creeks, *such* an act," he says, "would have made the State legislation void." We invoke, then, HIS high authority. When Mr. Burke, on the outbreak of the French Revolution, was charged, for some expressions which he uttered, with deserting Whig politics, after showing, as he

* 2 Peters, 257.

did, that the expressions used by him were nearly identical with many found in the writings of the great Whig statesman of the Revolution of 1688, he said, that he did not desire to be thought "a better Whig than Lord Somers." Nor do we—happy if we can *rightly* follow him—desire to assert the powers of the Federal Government further than they were asserted by John Marshall. We say, as he did, that the question is one of circumstances—circumstances which every wise judge, as every practical statesman, must regard, and in some degree be governed by. Here is a river, on the one hand, having a commerce not vast; and there, too, on the other, is a road which is the great line of communication between Boston, New York, Philadelphia, Baltimore, Washington, and all the South—a road which has a greater travel upon it perhaps than any road of the world, and which, somewhere, must cross this stream. A principle of law designed to protect commerce between the States must not be so construed as practically grievously to injure it.

In *Devoe* v. *The Penrose Ferry Bridge Company*, cited on the other side, and much misunderstood, this court (Grier, J.) said:

"At common law every obstruction, however small, to the free navigation of a public river might, in strictness, be styled a nuisance; but the application of this definition to every bridge over every creek where the tide ebbs and flows, or which a chance sloop might occasionally visit, would be absurd, and highly injurious to public interests. Intercourse by means of turnpikes, canals, railroads, and bridges, is a public necessity. A railroad constructed by the authority of a State is often many thousand times more beneficial to the interests of commerce than the unlimited freedom of navigation over unimportant inlets, creeks, or bays, or remote portions of a harbor. It would be unreasonable to insist that the millions who travel on them should be subjected to great delay or annoyance for the convenience of a few sloops or fishing-smacks.

"Where bridges are constructed with draws, or openings for the passage of masted vessels, and high enough to permit others to pass under, if possible, the occasional delay of such vessels for a short time may be a trifling inconvenience in comparison with the public benefit of the bridge. *In every investigation of this kind the question is relative, not absolute.* Whether a certain erection be a nuisance must depend upon the peculiar circumstances of each case. When the trade of the channel is of great amount and importance, and that across it trifling, the same rule cannot apply as to a case where the conditions are contrary. If a steam ferry can amply accommodate those who cross the stream, and a bridge with a draw would inflict an injury on commerce, and tax the public by increased freight, there is no sufficient reason why a bridge should be erected because it will be more profitable stock than a steamboat or towboat, or better accommodate some small neighborhood or neck of land.

"The city of Boston is situated on a peninsula. No public necessity could well exist which would justify a bridge, compelling *all* the commerce of her port to pass through a draw, while it might be very reasonable that vessels passing from one part of the port or harbor to another should be compelled to submit to some inconvenience for the sake of a bridge erected for one of the great railroads, so important to the prosperity and wealth of the city.

"It would be an abuse of the term to call the Schuylkill dam a nuisance because it is below tide water, and converts a few miles of useless sloop navigation into a canal, which, under the name of the Schuylkill Navigation Company, annually adds millions to the wealth of the city and State, and whose commerce constitutes the staple of this western portion of the port of Philadelphia. Nor is it any appreciable injury to the commerce of the port that vessels with high masts cannot pass the Market Street Bridge. Ample space for those vessels still remains at the wharves below. The great staple

of this western port is coal, and this bridge is built of such a height as not to interfere with the passage of the steam-tugs and canal-boats engaged in transporting it. *The city of Philadelphia now extends across the Schuylkill, and such a bridge* (a great thoroughfare across it at the connecting points), *is a public necessity. The same may possibly be said of the Gray's Ferry Bridge* (far lower down the stream), *over which the railroad to Baltimore passes.* Vessels with masts, and steamboats with high chimneys, are no doubt put to considerable inconvenience in passing the draw; but the bridge is so built that the immense trade in coal can pass by it without interruption."

And the court acted in perfect conformity to these principles when, in order to prevent an outlay while points of law and fact were yet contested, and in the interests, therefore, of all parties to the controversy, it granted a *preliminary* injunction to stay a bridge far down on the Schuylkill River—almost, indeed, as it enters the Delaware—the effect of whose erection the city of Philadelphia, by its Select and Common Councils, represented would be greatly to injure it and the whole line of wharves of the Schuylkill River, without any corresponding public benefit whatever.

The judge, indeed, in that case, misreading apparently, as the court's adjudication in the Wheeling Bridge Case, the expression, dicta simply, of McLean, J., to which we have referred, may have assumed that Federal authority was interfered with where it was not, and have expressed itself too strongly in support of a right of final injunction over such a stream. But the final injunction was never granted; and of what avail are such expressions as are cited on the other side, made, as the court declared, but as it has not been noted, contrary to its "desire," and to guard against "unnecessary fears excited?"—expressions never acted on, but the reverse, and which must be taken merely as an illustration of the way in which, when supporting against a powerful argument at the bar a decree which he is about to make, a judge will sometimes press with strength and earnestness, with all the power of statement and illustration which he possesses, a doctrine which he seeks to establish, and will go almost as far in one direction as counsel have gone in another, responding to extremes by exuberance. He does not then overlay his opinion by all the limitations, and qualifications, and restrictions which he would use were he inditing an academic lecture. Such expressions are natural, and comprehensible as well, to all except to those who cannot see that they were used responsively, and argumentatively, and hypothetically, and by way of illustration, and to exclude conclusions in a matter not requiring action upon them; and that some qualification and limitation of them when action is required, and when all the conditions of the problem may be reversed, argues no inconsistency of principle, but, contrariwise, may be the most intelligent form of principle's assertion.

Reply: Blackbird Creek bore no resemblance to the Passaic. It was a mere sluice, up and down which the Delaware estuated. There was no port of entry at its head. It had few or no inhabitants but those such as its name indicates, and no commerce of any kind. The case cited and relating to it does not apply.

GRIER, J. —It will not be necessary to a proper consideration of these cases to give an abstract of the testimony. Where opinions are received in evidence

there can be no restraint as to quantity. Such testimony is always affected by the feelings, prejudices, and interests of the witnesses, and is, of course, contradictory. A skipper will pronounce every bridge a nuisance, while travellers on plank or railroads will not think it proper that their persons or property should be subject to delay, or risk of destruction, to avoid an inconvenience or slight impediment to sloops and schooners. Owners of wharves or docks who may apprehend that their interests may be affected by a change of location of a bridge, are unanimous in their opinion that public improvement had better be arrested than that their interests should be affected. In this conflict of testimony and discordant opinion, we shall not stop to make any invidious comparisons as to the credibility of the witnesses, but assume such facts as have been already stated as the case.

That the proposed bridges will in some measure cause an obstruction to the navigation of the river, and some inconvenience to vessels passing the draws, is certainly true. Every bridge may be said to be an obstruction on the channel of a river, but it is not necessarily a nuisance. Bridges are highways, as necessary to the commerce and intercourse of the public as rivers. That which the public convenience imperatively demands cannot be called a public nuisance because it causes some inconvenience, or affects the private interests of a few individuals.

Now if every bridge over a navigable river be not necessarily a nuisance, but may be erected for the public benefit, without being considered in law or in fact a nuisance, though certainly an inconvenience affecting the navigation of the river, the question recurs, who is to judge of this necessity? Who shall say what shall be the height of a pier, the width of a draw, and how it shall be erected, managed, and controlled? Is this a matter of judicial discretion or of legislative enactment? Can that be a nuisance which is authorized by law? Does a State lose the great police power of regulating her own highways, and bridges over her own rivers, because the tide may flow therein, or as soon as they become a highway to a port of entry within her own borders? In the course of seventy years' practical construction of the Constitution, no act of Congress is to be found regulating such erections, or assuming to license a bridge over such a river, wholly within the jurisdiction of a State, if we except the doubtful precedent of the Cumberland Road; and during all this time States have assumed and exercised this power. If we now deny to the States, where do we find any authority in the Constitution or acts of Congress for assuming it ourselves?

These are questions which must be resolved before this court can constitute itself "*arbiter pontium*," and assume the power of deciding where and when the public necessity demands a bridge, what is sufficient draw, or how much inconvenience to navigation will constitute a nuisance.

The complainants in these bills, in order to show jurisdiction in the court, have stated themselves to be citizens of the State of New York. Their right to a remedy in the courts of the United States is not asserted, on account of the subject-matter of the controversy; nor do they allege any peculiar jurisdiction as given to us by any act of Congress, but rest upon their personal right as citizens of another State to sue in this tribunal. It is plain, by their

own showing, that they can demand no other remedy from this court than would be administered by the tribunals of the State of New Jersey in a suit between her own citizens. A citizen of New York who purchases wharves in Newark, or owns a vessel navigating to that port, has no greater right than the citizens of New Jersey. A court of chancery in New Jersey would not interfere with the course of public improvements authorized by the State, at the instance of a wharf owner, on the suggestion that a change in the location of a bridge would cause a depreciation in the value of his property. This is not a result for which (if the court can give any remedy at all) it will interfere by injunction. The court has no power to arrest the course of public improvements on account of their effects upon the value of property, appreciating it in one place and depreciating it in another. If special damage occurs to an individual, the law gives him a remedy; but he cannot recover, either in a court of law or equity, special damage as for a common nuisance, if the erection complained of be not a nuisance. A bridge authorized by the State of New Jersey cannot be treated as a nuisance under the laws of New Jersey. That the police power of a State includes the regulation of highways and bridges within its boundaries has never been questioned. If the legislature has declared that bridges erected with draws of certain dimensions will not so impede the commerce of the river as to be injurious or become a public nuisance, where can the courts of New Jersey find any authority for overruling, reversing, or nullifying legislative acts on a subject-matter over which it has exclusive jurisdiction? Admitting, for sake of argument, that Congress, in the exercise of the commercial power, may regulate the height of bridges on a public river in a State below a port of entry, or may forbid their erection altogether, they have neve yet assumed the exercise of such a power; nor have they by any legislative act conferred this power on the courts. The bridges will not be nuisances by the law of New Jersey. The United States has no common law offences, and has passed no statute declaring such an erection to be a nuisance. If so, a court cannot interfere by arbitrary decree either to restrain the erection of a bridge, or to define its form and proportions. It is plain that these are subjects of legislative, not judicial, discretion. It is a power which has always heretofore been exercised by State legislatures over rivers wholly within their jurisdiction, and where the rights of citizens of other States to navigate the river are not injured for the sake of some special benefit to the citizens of the State exercising the power.

It has been contended, on the authority of a dictum of my own, in *Devoe* v. *The Penrose Ferry Bridge Company*,* "that the Supreme Court have decided, in the case of *Pennsylvania* v. *The Wheeling Bridge*,† that although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a State, yet that, as courts of chancery, they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a State."

* 3 American Law Register, 32.

† 13 Howard, 579.

It is true that this doctrine was enunciated as a corollary from the Wheeling Bridge Case, on a motion for an *interlocutory* injunction against a bridge over a stream wholly within the territory and jurisdiction of Pennsylvania. On such motions, I have always refused to hear and definitively decide the great points of a case. If there be a *primâ facie*, or even doubtful, case shown, it is the interest of *both parties* that the interlocutory injunction should issue, and that the defendants should not expend large sums in erections which may *possibly* be treated hereafter by the court as nuisances. In the cases now before us the same course was pursued; but after full argument of this question on final hearing, and a careful consideration of it, I feel bound to acknowledge that the dictum I have just quoted from the report of the case of the Pearose Ferry Bridge Company is not supported by the decision of the Supreme Court in the Wheeling Bridge Case. It is true that such an inference might be drawn from a hasty or superficial examination of the opinion of the court as delivered in that case; but the point now to be considered was not in that case, and could not, therefore, have been decided. No judge, in vindicating the judgment of the court, can deliver maxims of universal application in every sentence, or oracles which may be read in two ways, one applicable to the case before him, and the other not. To sever the arguments of a judge from the facts of the case to which he refers will often lead to very erroneous conclusions. The fact that Pittsburg has been made a port of entry may have been mentioned as an additional or cumulative reason why Virginia should not be allowed to license a nuisance on the Ohio, below that city. But the question whether the power to regulate bridges over navigable rivers, wholly within the bounds of a State, could be exercised by it below a port of entry, and whether the establishment of such a port did *ipso facto* divest the State of such a power, was not in that case, and therefore not decided. This assertion will be fully vindicated by a careful examination of the record in that case.

1. It must be noted, as a circumstance of that case, that although the State of Pennsylvania, in her corporate capacity, was complainant, and "*propter dignitatem*" entitled to sue in the Supreme Court of the United States, yet that when the bill was filed, the same complaint might have been sustained in the Circuit Court of the United States, or the bridge might have been prostrated as a nuisance by indictment in the proper State court of Virginia. The bill charged that the bridge proposed to be erected was in utter disregard of the license granted by its charter, which carefully forbid the least interference with the navigation of the Ohio. On the facts charged and proved, a court of chancery of Virginia would have been bound to enjoin the erection of so palpable a nuisance to the navigation. The case, therefore, presented every fact necessary to give the court jurisdiction, a party having a right to sue in the court, a nuisance proposed to be erected without the sanction either of Virginia or the United States, and great special damage to the plaintiff.

2. During the pendency of this suit, the legislature of Virginia saw proper to come to the assistance of their corporation in the unequal contest, and at its suggestion enacted that the bridge proposed to be built contrary to the license granted to the corporation was according to it, and not thereupon to be considered as a nuisance by the laws of Virginia, notwithstanding that the

bridge was without a draw, and for many days in the year would wholly obstruct the passage of steamboats.

3. This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions.

Could Virginia license or authorize a nuisance on a public river, flowing, which rose in Pennsylvania, and passed along the border of Virginia, and which, by compact between the States, was declared to be "free and common to all the citizens of the United States?" If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of that great river from the State of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there would be no measure to her power. She would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States by compact made before the Constitution were held at the mercy or caprice of every or any of the States to which the river was a boundary. The decision of the court denied this right. The plea being insufficient as a defence, of course the complainant was entitled to a decree prostrating the bridge, which had been erected *pendente lite*. But to mitigate the apparent hardship of such a decree, if executed unconditionally, the court, in the exercise of a merciful discretion, granted a stay of execution on condition that the bridge should be raised to a certain height, or have a draw put in it which would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn that the courts of the United States claim authority to regulate bridges below ports of entry, and treat all State legislation in such cases as unconstitutional and void.

It is evident from this statement that the Supreme Court, in denying the right of Virginia to exercise this absolute control over the Ohio River, and in deciding that, as a riparian proprietor, she was not entitled, either by the compact or by constitutional law, to obstruct the commerce of a supra-riparian State, had before them questions not involved in these cases, and which cannot affect their decision. The Passaic River, though navigable for a few miles within the State of New Jersey, and therefore a public river, belongs wholly to that State. It is no highway to other States; no commerce passes thereon from States below the bridge to States above. Being the property of the State, and no other State having any title to interfere with her absolute dominions, she alone can regulate the harbors, wharves, ferries, or bridges, in or over it. Congress has the exclusive power to regulate commerce; but that has never been construed to include the means by which commerce is carried on within a State. Canals, turnpikes, bridges, and railroads, are as necessary to the commerce between and through the several States as rivers, yet Congress has never pretended to regulate them. When a city is made a port

of entry, Congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each State over her own public rivers. Congress may establish post-offices and post-roads; but this does not affect or control the absolute power of the State over its highways and bridges. If a State does not desire the accommodation of mails at certain places, and will not make roads and bridges on which to transport them, Congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry is an act for the convenience and benefit of such place and its commerce; but for the sake of this benefit the Constitution does not require the State to surrender her control over the harbor or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by her own.

Whether a bridge over the Passaic will injuriously affect the harbor of Newark is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the State of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other State; it would still be a port of entry if Congress chose to continue it so. Such action would not be in conflict with any power vested in Congress. A State may, in the exercise of its reserved powers, incidentally affect subjects intrusted to Congress without any necessary collision. All railroads, canals, harbors, or bridges, necessarily affect the commerce not only within a State, but between the States. Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a State exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads, and canals—to land as well as water? Assuming the right (which I neither affirm or deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the courts cannot assume to themselves such a power. There is no act of Congress or rule of law which courts could apply to such a case. It is possible that courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being "a good judge" could hardly be given to one who would endeavor to "enlarge his jurisdiction" by the assumption, or rather usurpation, of such an undefined and discretionary power.

The police power to make bridges over its public rivers is as absolutely and exclusively vested in a State as the commercial power is in Congress; and no question can arise as to which is bound to give way, when exercised over the same subject-matter, till a case of actual collision occurs. This is all that was decided in the case of *Wilson* v. *The Blackbird Creek*,* &c. That case has been the subject of much comment, and some misconstruction. It was never intended as a retraction or modification of anything decided in *Gibbons*

* 2 Peters, 257.

v. *Ogden*, or to the exclusive power of Congress to regulate commerce. Nor does the Wheeling Bridge Case at all conflict with either. The case of *Wilson* v. *The Blackbird Creek*, &c., governs this, while it has nothing in common with that of the Wheeling Bridge.

The view taken by the court of this point dispenses with the necessity of an expression of opinion on the questions on which so much testimony has been accumulated: What is the proper width of draws on bridges over the Passaic? How far the public necessity requires them? What is the comparative value of the commerce passing over or under them? What the amount of inconvenience such draws may be to the navigation, and whether it is for the public interest that this should be encountered rather than the greater one consequent on the want of such bridges? and, finally, the comparative merits of curved and straight lines in the construction of railroads. These questions have all been ruled by the legislature of New Jersey, having (as we believe) the sole jurisdiction in the matter. They have used their discretion in a matter properly submitted to it, and this court has neither the power to decide, nor the disposition to say, that it has been injudiciously exercised.

BILLS DISMISSED WITH COSTS.

As already mentioned in the text (p. 721), this decree was subsequently affirmed in the Supreme Court of the United States, the court being equally divided, however, and no opinion given.

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ADMINISTRATOR.

Where an administrator had been appointed, and after giving the required bonds informed the court that he was unable to act, and resigned the appointment, not having taken possession of the property of the intestate, or attempted to exercise any control over it, it was competent for the court to accept the resignation, and to appoint a new administrator. The power to accept the resignation and to make the second appointment, under these circumstances, were incidents of the power to make the first. *Comstock* v. *Crawford*, 396.

ADMIRALTY.

I. JURISDICTION.

1. Where a damage done is done wholly upon land, the fact that the cause of the damage originated on water subject to the admiralty jurisdiction does not make the cause one for the admiralty. *The Plymouth*, 20.
2. Hence, where a vessel lying at a wharf, on waters subject to admiralty jurisdiction, took fire, and the fire, spreading itself to certain storehouses on the wharf, consumed these and their stores, it was held not to be a case for admiralty proceeding. *Ib.*

II. PRACTICE.

3. A libel *in rem* against a vessel and personally against her master may properly under the present practice of the court be joined. And if the libellant have originally proceeded against vessel, master, *owners, and pilot*, the libel may with leave of the court be amended so as to apply to the vessel and master only in the way mentioned. *Newell* v. *Norton and Ship*, 257.

III. GENERAL PRINCIPLES. See *Sureties.*

4. A person who is master and part owner of a vessel in which a cargo has been wrongly sunk by collision from another vessel, may properly represent the insurer's claim for the loss of the cargo, and proceed to enforce it *in rem* and *in personam* through the admiralty. *Ib.*

AGENCY.

1. Whether there is sufficient proof of agency to warrant the admission of the acts and declarations of the agent in evidence, is a preliminary question for the court. *Cliquot's Champagne*, 114.

AGENCY (*continued*).

2. Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as a civil case, in all respects, as if the principal were the actor and the speaker. *Ib.*

AMENDMENT. See *Admiralty*, 8; *Practice*, 6.

APPEAL. See *Practice*, 2, 11, 12, 18.

1. Appeals from the District Courts of California, under the act of 3d March, 1851—which, while giving an appeal from them to this court, makes no provision concerning returns here, and none concerning citations, and which does not impose any limitation of time within which the appeal may be allowed—are subject to the general regulations of the Judiciary Acts of 1789 and 1803, as construed by this court. *Castro* v. *United States*, 46.

   Hence, the allowance of the appeal, together with a copy of the record and the citation, when a citation is required, must be returned to the next term of this court after the appeal is allowed. *Ib.*

2. An appeal allowed or writ of error issued must be prosecuted to the next succeeding term; otherwise it will become void. *Ib.*

3. The mere presence of the District Attorney of the United States in court, at the time of the allowance of an appeal, at another term than that of the decision appealed from, and without notice of the motion or prayer for allowance, will not dispense with citation. *Ib.*

4. The general rule that in cases of appeal the transcript of the record must be filed and the case docketed at the term next succeeding the appeal, has however exceptions; and will not apply where the appellant, without fault on his part, is prevented from seasonably obtaining the transcript by the fraud of the other party, or by the ill-founded order of the court below, or by the contumacy of its clerk. *United States* v. *Gomez*, 752.

5. A proceeding in the District or Circuit Court of the United States under the act of March 3d, 1851, for the ascertainment and settlement of private land claims in the State of California, is in the nature of a proceeding in equity. A decree of the Circuit Court in one of these cases transferred to it is therefore subject to appeal to the Supreme Court of the United States under the amendatory Judicial Act of March 3d, 1803. *United States* v. *Circuit Judges*, 673.

6. The court reproves counsel who take appeals without any expectation of reversal, and declares that if it had power to impose a penalty in such cases, as it has when writs of error are sued out for delay merely, it would impose it. *The Douro*, 564.

AVERAGE.

The liability of a cargo to contribute, in general average, in favor of the ship, does not continue after the cargo has been completely separated from the vessel, so as to leave no community of interest remaining. *McAndrews* v. *Thatcher*, 347.

AVERAGE (*continued*).

This principle illustrated in the following case:

A ship was stranded near her port of destination, and the underwriters upon her *cargo* sent an agent to assist the master in getting her off. The master and agent made all proper efforts to do this, for two days; when not succeeding at all, and the water increasing in the vessel, they began to discharge the cargo in lighters, still making efforts to save the ship. This discharge of the cargo occupied four days; by which time the whole of it was taken off, and, with the exception of a very small fraction in the lower hold and not discovered, taken to the ship's agents, who subsequently delivered it to its consignees, they giving the usual average bond. By the time that the cargo was thus all got off, the vessel, not assisted by being lightened, was settling in the sand, with the tide ebbing and flowing through her as she lay. The agent considering her case hopeless, and the consignees of the ship having refused to authorize him to incur any further expense, now went away.

On the next morning, and while the master was yet aboard, the underwriters on the *vessel* sent *their* agent, who got to work to float the vessel. Soon after the new agent came, the crew refused to do duty. The agent got new hands, and the crew went away. They were soon followed by the master, he leaving the vessel after the new agent had been in charge of her for four days. After six weeks' labor, and an expenditure of money somewhat exceeding her value when saved, the new agent succeeded in floating and rescuing the ship. The remnants of the cargo, in a damaged state, were delivered to its consignees.

On a suit by the owners of the ship against the consignees of the cargo, for contribution in general average for the expenses incurred after the master went away—

Held, that the case was not one for contribution; there having been, as the court considered, no community of interest remaining between the ship and cargo, after the master, in the circumstances of the case, had left the ship. *Ib.*

BANKERS. See *Internal Revenue*, 1.

BANKS. See *Internal Revenue*, 3, 4, 5, 6, 7.

BILL OF LADING.

The *primâ facie* legal effect of a bill of lading, as regards the consignee, is to vest the ownership of the goods consigned by it in him. *The Sally Magee*, 451.

BLOCKADE. See *Public Law*, 1–10; *Rebellion*, 3, 4.

INTENT TO VIOLATE.

1. Presumption of an intent to run a blockade by a vessel bound apparently to a lawful port, may be inferred from a combination of circumstances, as *ex. gr.* the suspicious character of the supercargo; the suspicious character of the master, left unexplained, though the case

BLOCKADE (*continued*).

was open for further proof; the fact that the vessel, on her outward voyage, was in the neighborhood of the blockaded place, and within the line of the blockading vessels, by *night*, and that her return voyage was apparently timed so as to be there by night again; that the vessel (though in a leaking condition, that condition having been known to the master before he set sail), paid no attention to guns fired to bring her to, but, on the contrary, crowded on more sail and ran for the blockaded shore; and that one witness testified *in preparatorio* that the master, just before the capture, told him that he intended to run the blockade from the first. *The Cornelius*, 214.

2. Although in such cases it is a possible thing that the intention of the master may have been innocent, the court is under the necessity of acting on the presumption which arises from such conduct, and of inferring a criminal intent. *Ib.*

3. If a vessel is found without a proper license near a blockading squadron under circumstances indicating intent to run the blockade, and in such a position as that if not prevented she might pass the blockading force, she cannot thus, *flagrante facto*, set up as an excuse that she was seeking the squadron with a view of getting an authority to go on her desired voyage. Nor did anything in the language of the President's proclamation of 19th April, 1861, vary this rule of public law in regard to vessels which had actual notice of the blockade established by the government of the United States at the beginning of the Southern rebellion. *The Admiral*, 603; *The Josephine*, 88; *The Cheshire*, 231.

BROKERS. See *Internal Revenue*, 2.

CALIFORNIA.

I. GENERAL LAW. See *Appeal*, 1, 5.

1. Under a statute of California, which provides that new matter in an answer shall on the trial be deemed controverted by the adverse party, witnesses may properly be examined, in a case where *such* an answer having new matter is put in. *Cheang-Kee* v. *United States*, 320.

2. In the Federal courts for the California Circuit (which have herein adopted the practice prevailing in the State courts under the State acts regulating proceedings in civil cases), not only may distinct parcels of land, if covered by one title, be included in one complaint or declaration, but, with a demand for these, may be united a claim for their rents and profits, or for damages for withholding them. *Beard* v. *Fedory*, 478.

Under this act, the provision as to the description by metes and bound of the lands sued for, is directory, only. *Ib.*

3. Where it is doubtful whether a mandamus would be effectual to compel the clerk to make a transcript of a record for the Supreme Court—as where the proceedings had been such that the question as to pendency of the appeal itself, could not well be determined without an inspection of the record—a resort to it is not obligatory. In such cases, if

CALIFORNIA *(continued)*.

the suit be an appeal in a land case from the California district, in which the United States is a party, it may apply to the district attorney for a transcript; the latter as well as the clerk having power under an act of Congress of March 3d, 1861, in such cases of appeal, to transcribe and certify the record to this court. *United States* v. *Gomez*, 752.

II. In Support of Mexican Grants.

4. To give jurisdiction to the Board of Land Commissioners to investigate and determine a claim to land alleged to have been derived from the Spanish or Mexican governments, it is not necessary that the petition of the claimant should aver that such claim was supported by any grant or concession in writing; it is sufficient if the petition allege that the claim asserted was by virtue of a right or title derived from either of those governments. The right or title may rest in the general law of the land. *Beard* v. *Federy*, 478.

III. In Defeat of Mexican Grants.

5. Written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, if coming from private hands, is insufficient to establish a Mexican grant if there is nothing in the public records to show that such evidence ever existed; though the court remarks that if the claimant can show to the satisfaction of the court that the grant has been made in conformity to law and *recorded*, and that the record has been lost or destroyed, he will then be permitted to give secondary evidence of its contents. *Peralta* v. *United States*, 434.

6. A bare possession for a year before our conquest of California is insufficient to establish an equity in opposition to the above first-announced rule. *Ib.*

7. In proceedings under the act of March 3, 1851, for the settlement of private land claims in California, where the claimant produces neither a concession nor a grant, and does not prove that he ever had possession of the land described in his petition, the claim is rightly disallowed. *United States* v. *Gomez*, 752.

IV. Acts of March 3, 1851, and of August 31, 1862, &c.

8. A proceeding in the District or Circuit Court of the United States, under the act of March 3d, 1851, for the ascertainment and settlement of private land claims in the State of California, is in the nature of a proceeding in equity. A decree of the Circuit Court in one of these cases transferred to it is, therefore, subject to appeal to the Supreme Court of the United States under the amendatory Judicial Act of March 3d, 1803. *United States* v. *Circuit Judges*, 673.

9. The legislation of Congress requiring all claims to lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, to be presented to the Board of Commissioners created under that act for investigation and settlement, and providing that all claims which are not thus presented within a specified period shall be

CALIFORNIA (*continued*).

considered and treated as abandoned, is not subject to any constitutional objection, so far as it applies to grants of an imperfect character which require further action of the political department of government to render them perfect. *Beard* v. *Federy*, 478.

10. As against the government and parties claiming under the government, a patent of the United States issued upon a confirmation of a claim to land by virtue of a right or title derived from Spain or Mexico—so long as it remains unvacated—is conclusive. *Ib.*

11. The term "third persons," mentioned in the fifteenth section of the act of March 3d, 1851, against whom the decree and patent of the United States are not conclusive, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government disposing of the property. *Ib.*

12. When under the act of August 31st, 1852, relating to appeals from the Board of Land Commissioners to ascertain and settle private land claims in California, created under the act of March 3d, 1851, the attorney-general gave notice that he would not prosecute the appeal, such appeal was for all legal purposes in fact dismissed, and the decree of the board took effect as if no appeal had been taken; and an order or decree of the District Court giving leave to the claimant to proceed upon the decree of the board as upon a final decree was a proper disposition of the case. *Ib.*

13. When the United States and the claimant to whom a Mexican grant has been confirmed are both satisfied with its location, any other person who seeks to contest such a location must show some title, legal or equitable, to some part of the land covered by the survey, before the court will disturb it at his instance, or in his alleged interest. *Dehon* v. *Bernal*, 774.

14. When all the elements of location prescribed by a decree of the District Court cannot possibly be complied with, and a survey conforms as much with the decree confirming the grant as it can well be made to do, this court will not disturb it. *Ib.*

CAPTURING FORCE.

On a question under the act of Congress of July 17th, 1862, which distributes prize-money according to the fact whether the captured vessel is of equal or superior force to the vessel or vessels making the capture, it is proper to consider as the capturing force, not only the flag-ship, leading, actually firing, and by her fire doing the only damage—immense damage—done, but also any other vessel which,—by having diverted the fire of the vessel forced to surrender, by an obviously great force, by its position, conduct, and plain purpose to come at once into the engagement and to inflict perhaps complete destruction,—may have hastened the surrender. *The Iron-clad Atlanta*, 425.

CHARTER PARTY. See *Lien.*

COLLISION. See *Admiralty*, 4; *Damages*, 2; *Navigation; Practice*, 4.

1. Where the question of fault in a collision lies, on the one hand, between a boat fast at a wharf, out of the track of other vessels, and moored, in all respects of place and signals, or want of them, according to the port regulations of the place, and, on the other, a steamer navigating a channel, of sufficient width for her to move and stop at pleasure, the fault, under almost any circumstances, where there is no unusual action of the elements or other superior force driving her to the place of collision, will be held to be with the steamer. *The Granite State*, 310.
2. Hence a steamer which, in going in the dark from a broad channel into her dock, runs—though in an effort to avoid other steamers coming out of *their* docks—against a barge moored at a wharf according to the port regulations, is responsible for the collision. Nor is it an excuse that the barge was without masts, lay low, and owing to her color was not visible in the dark till you were close by her; nor, if the port regulations of the place do not require them from vessels moored at wharves, that she was without both light and watch. *Ib.*
3. A vessel drifting from her moorings and striking against another vessel aground on a bar out of the channel or course of navigation, will be liable for damage done to the vessel aground, unless the drifting vessel can show affirmatively that the drifting was the result of inevitable accident, or of a *vis major*, which human skill and precaution could not have prevented. *The Louisiana*, 164.
4. The fact that a vessel on arriving at a wharf is moored in a way which, in reference to the state of the tide and wind at that time, is proper, and that in *this* position she is made as fast as she can be, is not an excuse for her breaking away on a change of tide and wind, if ordinary nautical skill would have suggested that such a change would produce different and reversed conditions of risk. *Ib.*

COMITY. See *Conflict of Jurisdiction.*

COMMERCIAL LAW. See *Average; Negotiable Instruments; Lien.*

COMMON CARRIER.

1. The common-law liability of a common carrier for the safe carriage of goods may be limited and qualified by special *contract* with the owner; provided such special contract do not attempt to cover losses by negligence or misconduct. *York Company* v. *Central Railroad*, 107.

   Thus, where a contract for the transportation of *cotton* from Memphis to Boston was in the form of a bill of lading containing a clause exempting the carrier from liability for losses by *fire*, and the cotton was destroyed by fire, the exemption was held sufficient to protect the carrier, the fire not having been occasioned by any want of due care on his part. *Ib.*
2. Where a bill of lading, signed by a master, shows that a voyage to a particular place named on it is but part of a longer transit which it is understood is to be made by the cargo shipped, and that the cargo is

COMMON CARRIER (*continued*).

to be carried forward in a continuous way on its further voyage, the master must be presumed to have contracted in reference to the course of trade connected with getting the cargo forward. *The Convoy's Wheat*, 225.

2. In such a case, if any obstacle should intervene, which by the regular course of the trade is liable to occur and for a short time retard the forwarding, the master cannot, from a mere inability to find storage at the *entrepôt*, turn about, and taking the cargo to some near port, store it there, inform the consignees, and clear out. He should wait. *Ib.*
4. If there is easy telegraphic communication with the consignees, he should notify to them his difficulty, that they may send him, if they please, instructions. *Ib.*
5. The first section of the act of Congress of March 3d, 1851, entitled "An act to limit the liability of ship-owners, and for other purposes," exempts the owners of vessels in cases of loss by fire from liability for the negligence of their officers or agents, in which the owners have not directly participated. *Walker* v. *The Transportation Company*, 150.
6. The proviso to that act allowing parties to make their own contracts in regard to the liabilities of the owners, refers to express contracts. *Ib.*
7. A local custom that ship-owners shall be liable in such cases for the negligence of their agents, is not a good custom; being directly opposed to the statute. *Ib.*

CONFLICT OF JURISDICTIONS.

I. Between Federal Courts and State Courts.

1. The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations; and is confined to suits between the same parties, or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought; and does not extend to all matters which may by possibility become involved in it. *Buck* v. *Colbath*, 334.
2. The case of *Freeman* v. *Howe* (24 Howard, 450)—an action of replevin—decided that property held by the marshal under a writ from the Federal court could not be lawfully taken from his possession by any process issuing from a State court; and decided nothing more. *Ib.*
3. The ground of that decision was, that the possession of the marshal was the possession of the court, and that pending the litigation, no other court of merely concurrent jurisdiction could be permitted to disturb that possession. *Ib.*
4. An action of trespass, for taking goods, does not come within the principle of that case, inasmuch as it does not seek to interfere with the possession of the property attached; but it involves the question, not raised in that case, of the extent to which the Federal courts will protect their officers in the execution of their processes. *Ib.*

CONFLICT OF JURISDICTIONS (*continued*)

5. With reference to this question, all writs and processes of the courts, may be divided into two classes:
   i. Those which point out specifically the property or thing to be seized.
   ii. Those which command the officer to make or levy certain sums of money, out of property of a party named.
   In the first class the officer has no discretion, but must do precisely what he is commanded. Therefore, if the court had jurisdiction to issue the writ, it is a protection to the officer in all courts.
   But in the second class the officer must determine for himself whether the property which he proposes to seize under the process is legally liable to be so taken, and the court can afford him no protection against the consequences of an erroneous exercise of his judgment in that determination. He is liable to suit for injuries growing out of such mistakes in any court of competent jurisdiction. *Ib.*
6. A plea, therefore, which does not deny that the property seized was the property of the plaintiff, or aver that it was liable to the writ under which it was seized, is bad in any court. *Ib.*

II. BETWEEN CONGRESS AND STATE LEGISLATURES.

7. A license granted by the United States, under the Internal Revenue Act of July 1, 1862, to carry on the business of a wholesale liquor dealer, in a particular State named, does not, although it have been granted in consideration of a fee paid, give the licensee power to carry on the business in violation of the State laws forbidding such business to be carried on within its limits. *McGuire* v. *The Commonwealth*, 887.
8. No State can, by either its constitution or other legislation, withdraw the Indians within its limits from the operation of the laws of Congress regulating trade with them; notwithstanding any rights it may confer on such Indians as electors or citizens. *United States* v. *Holliday*, 407

CONSTITUTIONAL LAW. See *Internal Revenue*, 6, 7.

I. VIOLATION OF CONTRACT.

1. An enactment by a State, in incorporating a company to build a toll-bridge and take tolls fixed by the act, that it should not be lawful for any person or persons to erect any bridge within two miles either above or below the bridge authorized, is a contract, and inviolable; this, though the charter of the company was without a limit as to the duration of its existence. *The Binghamton Bridge*, 52.
2. A clause in a statute "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," means, not only that no person or association of persons shall erect such a bridge without legislative authority, but that the legislature itself will not make it lawful for any person or association of persons to do so by giving them authority. *Ib.*
3. If a State grant no exclusive privileges to one company which it has incorporated, it impairs no contract by incorporating a second one

CONSTITUTIONAL LAW (*continued*).
which itself largely manages and profits by to the injury of the first *Turnpike Co.* v. *The State*, 210.

II. NAVIGABLE WATERS OF THE UNITED STATES

4. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie; and includes, necessarily, the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise. And it is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.

5. This power, however, covering as it does a wide field, and embracing a great variety of subjects, some of the subjects will call for uniform rules and national legislation; while others can be best regulated by rules and provisions suggested by the varying circumstances of differing places, and limited in their operation to such places respectively. And to the extent required by these last cases, the power to regulate commerce may be exercised by the States.

To explain. Bridges, turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and the commerce which passes over a bridge may be much greater than that which will ever be transported on the water which it obstructs. Accordingly, in a question whether a bridge may be erected over one of its own tidal and navigable streams, it is for the municipal power to weigh and balance against each other the considerations which belong to the subject—the obstruction of navigation on the one hand, and the advantage to commerce on the other—and to decide which shall be preferred, and how far one shall be made subservient to the other. And if such erection be authorized in good faith, not covertly and for an unconstitutional purpose, the Federal courts are not bound to enjoin it.

6. However, Congress may interpose whenever it shall be deemed necessary, by either general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority, both the legislative and judicial power of the nation are supreme. *Gilman* v. *Philadelphia*, 713.

7. Announciating these principles on the one hand and on the other, the court refused to enjoin, at the instance of a riparian owner, to whom the injury would be consequential only, a bridge about to be built, under the authority of the State of Pennsylvania, by the city of Philadelphia, over the River Schuylkill, a small river—tidal and navigable, however, and on which a great commerce in coal was carried on by barges—which river was wholly within the State of Pennsylvania, and ran through the corporate limits of the city authorized to erect the bridge; and on both sides of which citizens in great numbers lived, and on both sides of which municipal authority

CONSTITUTIONAL LAW (*continued*).
was exercised on one as much as on the other; the bridge being a matter of great public convenience every way, and another bridge, just like it, having been erected and in use for many years, over the same stream, about five hundred yards above. *Ib.*

III. INDIANS.

8. The act of Congress of February 13, 1862 (12 Stat. at Large, 339)—by which Congress intended to make it penal to sell spirituous liquor to an Indian under charge of an Indian agent, although sold outside of any Indian reservation and within the limits of a State—is constitutional, and is based upon the power of Congress to regulate commerce with the Indian tribes. *United States* v. *Holliday*, 407.
9. This power extends to the regulation of commerce with the Indian tribes, and with the individual members of such tribes, though the traffic and the Indian with whom it is carried on are wholly within the territorial limits of a State. *Ib.*
10. No State can by either its constitution or other legislation withdraw the Indians within its limits from the operation of the laws of Congress regulating trade with them, notwithstanding any rights it may confer on such Indians as electors or citizens. *Ib.*

CONTRACT. See *Constitutional Law*, 1–3.

I. MEANING OF, WITHIN THE CONSTITUTION.

1. An enactment by a State, in incorporating a company to build a toll-bridge and take tolls fixed by the act, that it should not be lawful for any person or persons to erect any bridge within two miles either above or below the bridge authorized, is a contract, and inviolable; this, though the charter of the company was without limit as to the duration of its existence. *The Binghamton Bridge*, 51.
2. A clause in a statute "that it shall not be lawful for any *person or persons* to erect a bridge within a distance of two miles," means, not only that no person or association of persons shall erect such a bridge without legislative authority, but that the legislature itself will not make it lawful for any person or association of persons to do so by giving them authority. *Ib.*
3. The incorporation by a State of a turnpike company to which it gives no exclusive privileges is not a contract that it will not incorporate a railroad company which itself shall manage and largely profit by to the injury of the first-named company. *Turnpike Co.* v. *The State*, 210.

II. WHEN VOID AS AGAINST PUBLIC POLICY.

4. Promissory notes given for a balance found due on settlement in a transaction itself forbidden by statute and illegal, or for money lent to enable a party to pay bills which the person taking the promissory notes had himself assisted, in violation of statute, to issue and circulate, cannot be enforced.
5. The fact that such promissory notes are given for a balance found due,

CONTRACT (*continued*).

or to enable a principal party in the illegal transaction to pay notes that have got into public circulation and are unpaid, does not purge them from the infirmity which belonged to the original vicious transaction. *Brown* v. *Turkington*, 377.

III. THOSE OF COMMON CARRIERS. See *Common Carriers*, 2, 5, 6.

6. The common-law liability of a common carrier for the safe carriage of goods may be limited and qualified by special *contract* with the owner; provided such special contract do not attempt to cover losses by negligence or misconduct. *York Co.* v. *Central Railroad*, 107.

COUNTY OFFICERS.

A county "officer" is one by whom the county performs its usual political functions or offices of government; who exercises continuously and as a part of the regular and permanent administration of government its public powers, trusts, or duties. A fixed number of persons specially and by name appointed by the legislature to act as a board of commissioners in a matter about which, though relating immediately to the county, county officers in the exercise of their general powers, as such, and without special authority from the legislature, have not authority to act, are not county "officers." *Sheboygan* v. *Parker*, 93.

Hence when special authority was given by the legislature to the people of a county to say whether or not they would subscribe to a railroad and bind themselves to pay for it, that body, in giving the authority, may properly direct the mode in which such subscription shall be made and paid for: may, *ex. gr.*, appoint special persons to make the subscription and to issue bonds in behalf of the county therefor—even though the constitution of the State in which the county is provides that "all *county officers*" shall be elected by the electors of the county, and though there may be a regular board of county supervisors elected accordingly, then administering the ordinary county affairs. Bonds so executed and issued bind the county. *Ib.*

COUPONS. See *Negotiable Instruments*, 2.

COURT AND JURY.

The question of legitimacy is a question for the jury; the law making no presumptions about it. Hence it is error to instruct a jury that if a man and woman live together as husband and wife, and the man acknowledge the woman as his wife and always treat her as such, and acknowledge and treat the children which she bore him as his children and permit them to be called by his name,—then that the *presumption of law* is in favor of their legitimacy. *Blackburn* v. *Crawfords*, 175.

CUSTOM. See *Common Carrier*, 2.

A custom opposed to a statute is void. *Walker* v. *The Transportation Co.*, 150.

CUSTOMS OF THE UNITED STATES. See *Evidence*, 2, 8, 12.

1. The provision in the Revenue Act of March 3d, 1863—that when foreign goods brought or sent into the United States are obtained otherwise than by purchase, they shall be invoiced at the "actual *market value* thereof at the time and *place* when and where the same were procured or manufactured"—does not mean any locality more limited than the *country* where the goods are bought or manufactured. The standard to be applied is the principal markets in that country. Hence proof of the market value in Paris of wines made at Rheims, a hundred and more miles off, may be given; there being no other evidence on the subject. *Cliquot's Champagne*, 114.
2. The expression in the act of 3d March, 1863, "If any owner, consignee, or agent shall *knowingly* make an entry of goods, &c., by means of any false invoice, certificate, or by means of any other false or fraudulent document," &c., means if such person shall make such entry, &c., of goods knowing that the invoice, &c., does not express their actual market value—swearing falsely and knowing it,—and the expression as used in the act refers to the guilty knowledge on the part of either the owner, consignee, or agent; the act of an agent or consignee being the act of the guilty principal. *Ib.*
3. The proviso in the act of 3d March, 1863, that its provisions shall not apply to invoices of goods, &c., imported from any place beyond Cape Horn or Good Hope until 1st January, 1864, does not apply to cases of fraud. If the guilty means were used after the act took effect, no matter when they were prepared, the offence is complete: revenue laws not being penal laws in the sense which requires them to be construed with great strictness in favor of the defendant. They are remedial laws, rather. *Ib.*
4. In *debt* for custom-house duties, a judgment for so many dollars, "payable in gold (and silver) money of the United States" for duties, is good; [nothing but gold and silver coin having been made a legal tender for this species of debt to the government; though Treasury notes were by a statute of 1862 made a legal tender in regard to most other debts.] *Cheang-Kee* v. *United States*, 320.
5. Under the Tariff Act of June 30, 1864, which lays a specific duty per gallon upon wines, and an *ad valorem* duty also, with a proviso that no *champagne* in bottles shall pay a *less* rate than $6 per dozen (quart) or two dozen (pint) bottles, the effect is that if the specific duty upon the gallon and the *ad valorem* duty *exceed* the sum of six dollars per dozen (quart) or two dozen (pint), the rate thus estimated will be the duty imposed. It is only when the rate falls *under* the sum of $6 that no less sum is chargeable. *Bollinger's Champagne*, 560.
6. Any entry knowingly made by means of false invoices, false certificates to the consul, or by means of any other false or fraudulent documents or papers, forfeits it, irrespective of the fact that if the entry had been truly made, the duty would have been no greater. The penalty is attached to the act of false entry, not to the result which such entry may, in the specific instance, produce on the revenue. *Ib.*

DAMAGES.

1. In suits for the infringement of patents, where there is no established license fee, and evidence of the utility and advantage of the patent infringed over other inventions previously used for producing its results, is resorted to in order to establish the measure of damages, the jury is not to estimate the damages for the whole term of the patent, but only for the period of the infringement. And a recovery does not vest the infringer with the right to continue the use. *The Suffolk Co.* v. *Hayden*, 315.
2. The sum which it will take to repair her is not an incorrect rule of damage, in case of injury from collision to an old barge of a peculiar structure and capacity of usefulness, and from these causes not having any established market value in the particular port where she is injured. *The Granite State*, 310.

DEBTOR AND CREDITOR.

Where a solvent firm owing *bonâ fide* a debt, learns—though by irregular and perhaps improper means on the part of one of their number—that the debt is about to be attached by a creditor of the person to whom they owe it, they may nevertheless pay the debt as soon as they please, and in such securities, including their own negotiable note, as their creditor is willing to accept; and if the debt is actually paid, and so acknowledged by their creditor to be, the creditor of such creditor cannot make them pay it over again to *him*; though his attachment may thus have been provokingly defeated. Neither is there anything in the laws of Tennessee relating to the attachment of debts due by non-residents that militates with this doctrine that a solvent man may at any time pay his just debts not attached by lawful process.—*Simpson & Co.* v. *Dall*, 460.

DECLARATIONS. See *Evidence*, 4.

DEED. See *Texas*.

To constitute delivery of a deed the grantor must, as a general thing, part with the possession of it, or at least with the right to retain possession. Upon a question of delivery, its registry, if by him, is entitled to great consideration, and might, perhaps, in the absence of opposing evidence, justify a presumption of delivery. But where the grantee had no knowledge of the existence of the deed, and the property which it purported to convey always remained in the possession and under the control of the grantor, and where, therefore, any registry was of course without either his assent or knowledge, the presumption of a delivery from the fact of registry is repelled. [N. B. In the case at bar, there was an allegation that the deed registered was a forgery.] *Younge* v. *Guilbeau*, 636.

DELIVERY. See *Deed*.

DEPOSITION. See *Evidence*, 1, 6.

DEPOSITS. See *Internal Revenue*, 3–5.

DISTRICT OF COLUMBIA.

A marriage in the District of Columbia, if celebrated by a clergyman *in facie ecclesiæ* is not invalid for want of a marriage license. *Blackburn v. Crawfords*, 175.

DRAFT. See *Statutes*, 10.

DUTY. See *Customs of the United States.*

EJECTMENT. See *California*, 2; *Illinois*, 5; *Practice*, 14.

ENROLMENT. See *Statutes*, 10.

ENROLMENT AND REGISTRY.

I. Of Vessels.

1. The act of December 23d, 1852, authorizing foreign vessels wrecked and repaired in the United States, to be registered or enrolled, is to be taken as a part of our system of registration and enrolment. *The Mohawk*, 566.
2. Vessels engaged in the foreign trade are *registered*, and those engaged in the coasting and home trade are *enrolled;* and the words "register" and "enrolment" are used to distinguish the certificates granted to those two classes of vessels. *Ib.*
3. The two statutes providing generally for registry and enrolment of vessels, are the act of December 31st, 1792, applicable exclusively to registry of vessels engaged in foreign commerce, and the act of July 18th, 1793, applicable exclusively to vessels engaged in domestic commerce. *Ib.*
4. The penalty of forfeiture of a vessel for the use of a certificate of registry to which she is not entitled, found in the 27th section of the act of 1792, is not imported into the act of 1793; and there is no forfeiture under that act for the use of a fraudulent enrolment. *Ib.*
5. But the act of March 2d, 1831, concerning vessels used on our northern frontiers, which are necessarily engaged in both the foreign and home traffic at the same time, makes the certificate of enrolment equivalent to both registry and enrolment. *Ib.*
6. This act does, by the *proviso* to its 3d section, apply the penalty of forfeiture contained in the 27th section of the act of 1792 to an enrolment, having the effect of a register, fraudulently obtained. *Ib.*

II. Of Deeds. See *Texas.*

ENTRIES. See *Evidence*, 5, 6, 7.

EQUITY.

I. Injunction. See *Constitutional Law*, 7.

II. Decrees in.

The language of a decree in chancery must be construed in reference to the issue which is put forward by the prayer for relief and other pleadings, and which these show it was meant to decide. Hence, though the language of the decree be very broad and emphatic,—enough so, perhaps, when taken in the abstract merely, to include the decision

EQUITY (*continued*).

of questions between codefendants,—yet where the pleadings, including the prayer for relief, are not framed in the way usual in equity when it is meant to bring the respective claims and rights of codefendants before the court, but are framed as in a controversy between the complainant and defendant chiefly or only—such general language will be held down to these two principal parties alone. *Graham* v. *Railroad Co.*, 704.

EVIDENCE. See *Court and Jury; Judicial Proceedings*, 1; *Maryland*, 1; *Privileged Communication; Rebellion*, 1.

I. IN CASES GENERALLY.

1. Where a deposition is taken upon a commission, the general rule is that all objections to it of a formal character, and such as might have been obviated if urged on the examination of the witness, must be raised at such examination, or upon motion to suppress the deposition. It is too late to raise such objections for the first time at the trial. *Fork Co.* v. *Central Railroad*, 107; *Blackburn* v. *Crawfords*, 175.

So where a deposition, after a motion on grounds set forth has been unsuccessfully made at one term to suppress it, as irregularly taken, is at another read on trial without objection or exception, it cannot be objected to in an appellate court on the grounds that were made for its suppression, or at all. *Brown* v. *Turkington*, 377.

2. Prices-Current obtained from the agent of a manufacturer or from dealers in the manufactured articles generally, and which have been prepared and used by the parties furnishing them in the ordinary course of their business, are so far evidence of the value of the articles mentioned in them as that they may be submitted to the jury as "throwing light" on the matter; as "some guides to candid men," and for their "consideration." And this rule was held to apply so far as that the *comparative* value, at the town of manufacture (Rheims) and at the capital of the country (Paris), of champagne wines made by one manufacturer (Cliquot), was allowed to be shown by the Prices-Current giving the value of that made by others (Mumm, Moet & Chandon); it not appearing—either by evidence in the case set forth in the bill of exceptions, or by an admission of the judge upon the bill, that such evidence was given—but that the articles were the same in price, kind, and quality. *Cliquot's Champagne*, 114.

3. In order to show the actual market value of articles of merchandise at a particular place in a foreign country, letters by third parties abroad to other third parties—offering to sell at such rates—if written in the ordinary course of the business of the party writing them, and contemporaneously with the transaction which is the subject of the suit—are admissible as evidence, even though neither the writers nor the recipients of the letters are in any way connected with the subject of the suit, and though there is no proof that the writers of the letters are dead. *Fennerstein's Champagne*, 145.

Though, on a question of marriage and legitimacy, it is competent, in order to prove an heirship asserted, to give in evidence the declara-

EVIDENCE (*continued*).

tions of any deceased member of *that* family to which the person from whom the estate descends belonged, yet it is not competent to give the declarations of a person belonging to another family,—such person being connected with the person from whom the estate descends only by an asserted intermarriage of a member of each family. *Blackburn* v. *Crawfords*, 175.

5. Independently of statute requiring it to be kept, a baptismal register of a church, in which entries of baptism are made in the ordinary course of the clergyman's business, is admissible to prove the *fact* and *date* of baptism, but not to prove other facts, as, *ex. gr.*, that the child was baptized as the *lawful* child of the parents, and hence to infer a marriage between them. *Ib.*

6. Where there has been no official registry of marriages kept in the church where a clergyman ministered, a private memorandum, in which the minister, in the ordinary course of his business, has entered or intended to enter, as it occurred, each marriage celebrated by him, is admissible on a question whether such minister ever did or did not celebrate a particular marriage in question. *Ib.*

But the memorandum ought itself to be produced; and if the testimony of the minister proving the memorandum is taken by commission, the memorandum ought itself to be annexed to the deposition; or—if the deposition is taken in a foreign country and the possessor of the memorandum be unwilling to part with the original—a proved copy. *Ib.*

7. On a question whether a particular priest of the Roman Church ever celebrated a marriage at a particular church between parties who had been previously living in fornication, his statement that no official registry of marriages was kept, but that he kept a private memorandum for himself (producing and annexing it as above specified), and that the alleged marriage did not appear in it; that he was aware the law imposed a penalty for performing the ceremany without a license; that he never married parties without a license; that he always required the presence of two witnesses; and that he never celebrated a secret marriage between parties living in sin, one or both of whom would only be married on the condition that such marriage was to be kept secret—is admissible. *Ib.*

8 Reputation being sufficient to establish death and heirship, a statement of them in a deposition, by an ancient witness, long and intimately acquainted with the family about which he testifies, and who says that certain children ("as appears from entries in the family Bible, and which I believe to be true,") died at such a time, and another child at another time, "as I am informed and believe,"—is not subject to exception at the trial. *Secrist* v. *Green*, 744.

9. A party offering secondary evidence of the contents of papers must show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him: *Hence*,

EVIDENCE (*continued*).

Where certain original letters had been passing between two attorneys in a case, and one of the attorneys testified that he had looked over his papers for all such documents as related to the case, and that the needed letters were not among them; that he recollected thinking about the letters at the time he was looking over his papers, but (being under the impression that he had left them with his colleague) did not make "any special search for them:"

And where the other attorney testified that he *had* had the letters, but was under the impression that he had returned them to the first attorney; that he had not examined his *files* of letters, and, not finding his letters among the other papers in his possession, supposed that the first attorney had them:

Held, that the secondary evidence of the contents of the letters was wrongly given: the court assuming of course that the search was insufficient. *Simpson & Co.* v. *Dall*, 460.

II. In Patent Cases.

10. In cases for the infringement of a patent, where there is no established license fee, general evidence may be resorted to in order to get at the measure of damages; and evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate. *The Suffolk Co.* v. *Hayden*, 315.

III. In Prize Cases.

11. Ownership presumptively in an enemy, by virtue of a bill of lading consigning the goods to him, is not disproved by a test affidavit in prize, stating generally that the goods consigned had been purchased for their consignee contrary to his instructions, and that he had rejected them; and that this appeared "from the correspondence of the parties," which the affiant (an asserted agent of the alleged true owner) swore that he "believed to be true," but which neither he nor any one produced, or accounted for the absence of; and where, though two years had passed between the date of the claim and that of the decree, the consignors and asserted owners, who lived at Rio Janeiro, had not manifested any interest in the result of the prize proceedings, which were at New York, nor, so far as appeared, had been even applied to in the matter. The case would, however, be different if the allegation as to purchase by the consignor, in contravention of orders, and subsequent rejection by the consignee, were sufficiently proved; and proved affirmatively, as it is requisite to prove it. *The Sally Magee*, 451.

IV. In Revenue Cases.

12. The provisions in the 70th and 71st sections of the Revenue Act of 1799, by which when a probable cause of forfeiture is made out to the satisfaction of the judge trying the case, the *onus* of proving innocence is thrown upon the claimant, apply to the act of 3d March, 1863, though not in terms adopted by it; neither of the said sections

EVIDENCE (*continued*).

having been ever repealed, and this rule of *onus probandi* having been always regarded as a permanent feature of our revenue system. *Cliquot's Champagne*, 114.

EXECUTION.

Levy of an execution, even if made on personal property sufficient to satisfy the execution, is not *per se* satisfaction of the judgment, and, accordingly, therefore, does not extinguish it if the levy have been abandoned at the request of the debtor and for his advantage; as *ex. gr.* the better to enable him to find purchasers for his property. *United States* v. *Dashiel*, 688.

ILLINOIS.

1. By the laws of Illinois, a copy of a will proved in one State, and with its probate and letters duly authenticated under the act of Congress for the authentication of records to be used in others, may, after certain formalities gone through, be recorded in the county courts of a county of Illinois, where the testator had property. And when so recorded, certified copies of such county court records are evidence; being so under the general laws of the State. *Secrist* v. *Green*, 744.
2. When a decree finds that due legal notice of intended proceedings in partition had been given to all the heirs of a decedent, the finding is, in Illinois, *primâ facie* though not conclusive evidence of the fact. *Ib.*
3. An acknowledgment, on the day of its date, before a master of chancery, in New York, of a deed executed 3d March, 1818—probate being made by a subscribing witness personally known to the master, of the identity of the party professing to grant with the party presenting himself to acknowledge—and the record of acknowledgment certifying that the grantor "consented that the deed might be recorded where necessary"—was a sufficient acknowledgment of the deed, by the laws of New York regulating the subject, at the date when the deed was made. *Ib.*
4. Having been so, and conveying land in Illinois, such deed was entitled to be recorded in Illinois; the laws of that State allowing deeds for lands in the State, executed out of it but within the United States, to be recorded when acknowledged or proved in conformity with the law of the State where executed; and when so recorded, it was properly read without other proof of execution. *Ib.*
5. In Illinois, and under its statutes relating to ejectment, when a question of fraud in obtaining a title to real estate has been submitted, in a suit in ejectment, to a jury, and determined against the party setting it up, such party, notwithstanding the nature of the action, cannot go into equity and ask relief there, setting up essentially the same frauds, and sustaining them by the same evidence that he relied on to make out his case in the suit in ejectment at law. *Blanchard* v. *Brown*, 245.

INDIANS.

1. By the act of February 18th, 1862 (12 Stat. at Large, 339), relating to the Indians, Congress intended to make it penal to sell spirituous

INDIANS (*continued*).

liquor to an Indian under charge of an Indian agent, although it was sold outside of any Indian reservation and within the limits of a State. *United States* v. *Holliday*, 407.

2. The act is constitutional, and is based upon the power of Congress to regulate commerce with the Indian tribes. *Ib.*

3. This power extends to the regulation of commerce with the Indian tribes and with the individual members of such tribes, though the traffic and the Indian with whom it is carried on are wholly within the territorial limits of a State. *Ib.*

4. Whether any particular class of Indians are still to be regarded as a tribe, or have ceased to hold the tribal relation, is primarily a question for the political departments of the government, and if they have decided it, this court will follow their lead. *Ib.*

INSURANCE. See *Admiralty*, 4.

INTERNAL REVENUE.

1. Bankers who sell the Federal securities no otherwise than for the United States and for themselves, and who, therefore, do not sell them for others or for a commission, are not liable to pay the duties imposed by the 99th section of the Internal Revenue Act, of June 30th, 1864, amended by the act of March 3d, 1865, imposed upon "brokers and *bankers doing business as brokers.*" *United States* v. *Fisk*, 445.

2. Brokers who sell, for themselves, stocks, bonds, and securities, are subject, under the act of June 30th, 1864, amended as above said, to the same duties as when they sell them for others. *United States* v. *Cutting*, 441.

3. Savings banks which receive deposits and lend the same for the benefit of their depositors, although they may have no capital stock, and neither make discounts nor issue any money for circulation, are "engaged in the business of banking" within the meaning of the first clause of the 110th section of the Revenue Act of 30th June, 1864, which enacts that "there shall be levied, collected, and paid a duty of $\frac{1}{24}$th of 1 *per cent.* each month upon the average amount of the *deposits* of money . . . . . with any person, bank, association, corporation, or company *engaged in the business of banking.*" *Bank for Savings* v. *The Collector*, 495.

4. On the repeal of the proviso to that section, which declared that the section should not apply "to any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning the same on interest for the benefit of the depositors only, and which do no other business of banking," such savings banks became subject to the duty imposed by the principal enactment. *Ib.*

5. Moneys received by such banks from depositors become "deposits" within the meaning of the act as soon as they are received, and as such are immediately subject to taxation. *Ib.*

6. The act of June 3d, 1864, "To provide a national currency," &c.,

INTERNAL REVENUE (*continued*).

rightly construed, subjects the shares of the banking associations authorized by it, and in the hands of shareholders, to taxation by the States under certain limitations (set forth in its 41st section), without regard to the fact that a part or the whole of the capital of such association is invested in national securities declared by the statutes authorizing them to be "exempt from taxation by or under State authority." *Van Allen* v. *The Assessors*, 573.

7. The act thus construed is constitutional. *Ib.*

8. An act of a State which taxed such shares, but which did not provide that the tax imposed should not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State, is not warranted by the act of Congress, and is void: there having been under the legislation of the State no tax laid on *shares* in State banks, although there was a tax on the *capital* of such banks. *Ib.*

INTERPRETATION OF LANGUAGE. See *Constitutional Law*, 2; *Customs of the United States*, 2; *Equity*.

JOINT TRESPASSER. See *Trespasser*.

JUDGMENT. See *Judicial Proceedings*, 2; *Execution*.

In *debt* for custom-house duties, a judgment for so many dollars, "payable in gold (and silver) money of the United States" for duties, is good; [nothing but gold and silver coin having been made a legal tender for this species of debt to the government; though Treasury notes were by a statute of 1862 made a legal tender in regard to most other debts.] *Cheang-Kee* v. *United States*, 320.

A judgment against one joint trespasser is no bar to a suit against another for the same trespass. Nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar. *Lovejoy* v. *Murray*, 1.

JUDICIAL PROCEEDINGS.

REGULARITY OF, PRESUMED.

1. The recital in the record of proceeding of a Probate Court, under a statute of Wisconsin Territory, of facts necessary to give such court jurisdiction, is *primâ facie* evidence of the facts recited. *Comstock* v. *Crawford*, 397.

2. The jurisdiction existing, the subsequent action of the court is the exercise of its judicial authority, and can only be questioned on appeal; the mode provided by the law of the Territory for review of the determinations of the court. *Ib.*

Where a statute of the Territory provided that the real estate of the decedent might be sold to satisfy his just debts when the personalty was insufficient, and authorized the Probate Court of the county where the deceased last dwelt, or in which the real estate was situated, to license the administrator to make the sale upon represents-

JUDICIAL PROCEEDINGS (*continued*).

tion of this insufficiency, and "on the same being made to appear' to the court, and required the court, previously to passing upon the representation, to order notice to be given to all parties concerned, or their guardians, who did not signify their assent to the sale, to show cause why the license should not be granted:

Held, that the representation of the insufficiency of the personal property of the deceased to pay his just debts was the only act required to call into exercise the power of the court. The necessity and propriety of the sale solicited, were matters to be considered at the hearing upon the order to show cause. A license following such hearing involved an adjudication upon these points, and such adjudication was conclusive. *Ib.*

JUDICIAL SALE. See *Judicial Proceedings*.

1. A bidder at a judicial sale at public auction, whose bid has not been accepted,—the sale being adjourned for sufficient cause and finally discontinued—cannot insist, even though he have been the highest and best bidder, on leave to pay the amount of his bid, and have a confirmation of the sale to *him*. *Blossom* v. *Railroad Company*, 196.
2. The marshal, or other officer, who makes a sale of real property under a decree of foreclosure, possesses the power, for good cause shown, in the exercise of a sound discretion, and in subordination to the superior control of the court over the whole matter of the sale, to adjourn the sale from time to time. *Ib.*
3. In a case where the decree was that the sale should be made *unless the mortgagors should previously pay the mortgage debt*, a few short adjournments for the purpose of enabling the mortgagors to make an arrangement to pay it, are adjournments for sufficient cause, although such adjournments have been made by direction of the complainant's solicitor. And if, prior to the day to which the sale stands adjourned, the mortgagors come in and pay the complainants the amount of the decree, &c., the sale may properly be discontinued altogether. *Ib.*
4. A second license to an administrator to sell property already sold by him, and a second purchase of it by the same party who had already bought it before, is not evidence of fraud in the first sale. *Comstock* v. *Crawford*, 396.
5. The title of a purchaser at an administrator's sale is not affected by the fact that the proceeds of the sale exceeded the amount of the alleged debts of the decedent, for the payment of which such sale was ordered. *Ib.*

JURISDICTION. See *Practice*, 8.

I. Of the Supreme Court of the United States.

(*a*) *Where it has Jurisdiction.*

1. It has jurisdiction of a mining claim in Nevada, if of the requisite value, though the land where the claim exists may have never been surveyed nor brought into market. *Sparrow* v. *Strong*, 97.

JURISDICTION (*continued*).

2. It will take jurisdiction of a case where the judgment below purports to affirm generally the judgment of a court inferior to the affirming court; and the only judgment in the record of such inferior court is a general judgment; this, though an appeal has also been taken in the inferior court, under State laws, upon a motion refusing a new trial, and there are some indications in the record that this affirmance was intended to be of that refusal. *Ib.*
3. A suit prosecuted in the State courts to the highest court of such State, against a marshal of the United States for trespass, who defends himself on the ground that the acts complained of were performed by him under a writ of attachment from the proper Federal court, comes within its jurisdiction under the 25th section of the Judiciary Act, when the final decision of the State court is *against* the validity of the authority thus set up by the marshal. *Buck* v. *Colbath*, 334.
4. Where a party is indicted in a State court for doing an act contrary to the statute of the State, and sets up a license from the United States under one of its statutes, and the decision of the State court is against the right claimed under such last-mentioned statute, this court has jurisdiction under the 25th section of the Judiciary Act. *McGuire* v. *The Commonwealth*, 382.
5. The fact that a plaintiff in error who was also plaintiff below, previously to taking his writ of error issued execution and got a partial but not a complete satisfaction on his judgment, is not enough to oust this court of its jurisdiction. *United States* v. *Dashiel*, 688.
6. An appeal in a decree of foreclosure in chancery, will not be dismissed because the complainant below, appellant here, had, after his appeal made, issued execution and got the amount for which the decree he appealed from, gave him. *Merriam* v. *Haas*, 687.
7. Where a decree was obtained by fraud, still if in form correct, it is sufficient as against the appellee to sustain the appeal, correct the error, and dispose of the case. *United States* v. *Gomez*, 752.

(*b.*) *Where it has* NOT *jurisdiction.*

8. It has not jurisdiction to review, under the 25th section of the Judiciary Act of 1789, a final judgment or decree by the highest court of law or equity of a State, that revenue stamps attached to a deed offered in evidence and objected to as not having stamps proportioned to the value of the land conveyed are sufficient. *Lewis* v. *Campan*, 106.
9. Nor under the act of April 29, 1802 (§ 6),—providing "that whenever *any question* shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, *the point* upon which the disagreement shall happen shall be certified to the Supreme Court, and shall by the said court be finally decided,"—will the court even by consent of parties take jurisdiction, unless the certificate of division present, in a precise form, a point of law upon a part of the case settled and stated. *Daniels* v. *Railroad Company*, 250; *Havemeyer* v. *Iowa County*, 294.
10 Nor will it, unless, besides raising a distinct legal point, sufficient facts are set forth to show the bearing of the question on the rights of the

JURISDICTION (*continued*).

parties. Hence no answer will be given to a proposition merely abstract. *Havemeyer* v. *Iowa County*, 294.

11. Nor, in a suit to recover mineral lands on the Pacific coast, with the mines therein, on an allegation of record, of prior possession of the land for the purpose of taking out the minerals, without an allegation that such possession is had under authority, or by some treaty or statute of the United States, has it jurisdiction to re-examine the case under the 25th section of the Judiciary Act of 1789. *Boggs* v. *Mining Company*, 304.

12. Nor where the decision below is that, as a *matter of fact*, no such license exists; in a case where the courts of the State, to whose highest court of law and equity the writ of error is sent, have the power, under the constitution of its State, to decide both law and fact upon submission of the case by the parties.

II. Of Circuit Courts of the United States.

13. The 12th section of the Judiciary Act of 1789, which gives to the Circuit Courts concurrent jurisdiction of all crimes and offences cognizable in the District Courts, is prospective, and embraces all offences the jurisdiction of which is vested in the District Courts by subsequent statutes. *United States* v. *Holliday*, 407.

14. Therefore, the Circuit Courts have jurisdiction of the offence of selling ardent spirits to an Indian, under the act of February 13th, 1862, although by that act the jurisdiction is vested only in the District Court. *Ib.*

15. Under the second section of the act of 8th August, 1840, "to regulate the proceedings in the Circuit and District Courts," and which, after authorizing the transfer of criminal causes from either court to the other on motion of the district attorney, says that "the court to which such remission is made, shall, after the order of remission is filed therein, act and proceed in the case as if the indictment and all the other proceedings in the same had been originated in said court," an indictment may be remitted from the District Court to the Circuit Court, though it have come into the District Court originally only by being sent there from the Circuit Court. *United States* v. *Murphy*, 649.

16. Where a contract, under which a party would be prevented, from want of proper citizenship, from suing in the Federal courts, is set out but as inducement to a subsequent one under which he would not be so prevented, the jurisdiction of such courts will not be taken away from the fact of the old contract's being set forth as inducement only somewhat indefinitely. Coming, in such a case, within the principle of a contract defectively stated, but not of one defective, the mode of stating it is cured by the verdict. *De Sobry* v. *Nicholson*, 420.

III. Of District Courts of the United States. See *Admiralty*.

JURY. See *Court and Jury*.

LEGISLATIVE POWER. See *Constitutional Law*, 1, 2, 3, 5, 6, 9; *Municipal Powers*, 1; *Police Regulations*.

1. If the legislature possess the power to authorize an act to be done, it can by a retrospective act cure the evils which existed because the power thus conferred has been *irregularly* executed. *Thomson* v. *Lee County*, 327.
2. No State can by either its constitution or other legislation withdraw the Indians within its limits from the operations of the laws of Congress regulating trade with them; notwithstanding any rights it may confer on such Indians as electors or citizens. *United States* v. *Holliday*, 407.

LEVY. See *Execution*.

LICENSE. See *Police Regulations*.

LIEN. See *Rebellion*, 1.

1. Stipulations in a charter-party requiring the delivery of the cargo within reach of the ship's tackle, and providing that the balance of the charter-money remaining unpaid on the termination of the homeward voyage shall be "payable, one-half in five, and one-half in ten days after discharge" of the cargo, are not inconsistent with the right of the owner to retain the cargo for the preservation of his lien. *The Kimball*, 37.
2. A clause in a charter-party, by which the owner binds the vessel, and the charterers bind the cargo, for the performance of their respective covenants, is sufficient to repel doubt arising upon the construction of other stipulations not plainly controlling them, as to whether the lien for freight was intended to be waived by the parties. *Ib.*
3. By the general commercial law a promissory note does not extinguish the debt for which it is given, unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. And although in Massachusetts the rule is different, and the presumption of law there is that a promissory note extinguishes the debt for which it is given, yet there the presumption may be repelled by evidence that such was not the intention of the parties; and this evidence may arise from the general nature of the transaction, as well as from direct testimony to the fact. *Ib.*
4. Upon this ground it is not to be presumed that the owner of a ship, having a lien upon a cargo for the payment of the freight, intended to waive his lien by taking the notes of the charterers drawn so as to be payable at the time of the expected arrival of the ship in port. The notes being unpaid, he may return them and enforce his lien. *Ib.*
5. To acquire, as against all mortgages and incumbrances, a lien by statute upon the *corpus* of a railroad, in virtue of credit advanced, it is necessary that the statute express in terms not doubtful the intention to give a lien. The fact that, on one side, by not making a particular

LIEN (*continued*).
clause in the statute operate as a lien on the road, you leave it but declaratory of ordinary law, is not enough to give a lien, when, on the other, by making the clause so operate, you would give one where the parties have declined to *take one in ordinary form* and contracted for a pledge of the *capital stock* of the road. *Cincinnati City* v. *Morgan*, 275.

LOOKOUTS. See *Navigation*.

MARRIAGE AND LEGITIMACY. See *Evidence*, 4, 5, 6, 7, 8; *Presumption*; *Maryland*, 1, 2.

1. Although parties have lived long together, and a marriage has been sworn to and the circumstances particularly described by one of the parties, and other witnesses have testified to facts indicative of wedlock as distinguished from a concubinate, still a jury may find, on counter evidence, that the cohabitation during the whole term was illicit. *Blackburn* v. *Crawfords*, 175.
2. In ejectment, where a regular marriage by a clergyman *in facie ecclesiæ* at a specific time and place is set up as evidence of the legitimacy of children suing as heirs-at-law to recover, and all the testimony in the case clusters about and relates to *such* a marriage, it is error to refer it to the jury to consider whether the parents were *at any time* married; and in such a case, unless they find that a marriage was in fact celebrated, they cannot find that the connection was wedlock or that the issue from it is legitimate. *Ib.*

MARYLAND.

1. By the law of Maryland a finding by a jury—on an issue directed by the Probate Court—that a party who has applied for administration on the estate of one whom he asserts to be his uncle, is illegitimate, and a consequent grant of administration by the court to another party, is conclusive of the illegitimacy *as between these parties*, in an action of ejectment subsequently brought by the party rejected. *Blackburn* v. *Crawfords*, 175.
2. By the law of Maryland if parties having had children in concubinage, marry and after the marriage recognize and treat such children as theirs, such children are regarded as legitimate. *Ib.*

MASSACHUSETTS. See *Practice*, 8.

Although in Massachusetts the presumption of law is that a promissory note extinguishes the debt for which it is given—the rule in that State differing from the rule of commercial law, generally—yet even there the presumption may be repelled by evidence that such was not the intention of the parties; and this evidence may arise from the general nature of the transaction, as well as from direct testimony to the fact. *The Kimball*, 37.

Upon this ground *held*, in a case from Massachusetts, that it was not to be presumed that the owner of a ship, having a lien upon a cargo for

MASSACHUSETTS (*continued*).
the payment of the freight, intended to waive his lien by taking the notes of the charterers payable at the time of the expected arrival of the ship in port. On the contrary, the notes being unpaid, his return of them, and an enforcement of his lien was held proper. *Ib.*

MINING CLAIM IN NEVADA. See *Jurisdiction*, 1.

MUNICIPAL BONDS. See *County Officers; Municipal Powers*, 1, 2; *Negotiable Instruments*.

1. A contract, valid by the constitution and laws of a State, as expounded by the highest authorities whose duty it was to administer them, at the time when the contract was made, cannot be impaired in its obligation, by any subsequent action by the legislature or judiciary. The case of *Gelpcke* v. *The City of Dubuque* (1 Wallace, 175) herein affirmed and enforced. *Havemeyer* v. *Iowa County*, 294; *Thomson* v. *Lee County*, 327.
2. Power in a municipal corporation to issue bonds being shown, the corporation, as against *bonâ fide* holders of them for value, is estopped to deny that the power was properly executed. *Rogers* v. *Burlington*, 654; *Cincinnati City* v. *Morgan*, 275.

MUNICIPAL POWERS.

1. A county, or other municipal corporation, cannot subscribe for stock in a public improvement, unless authorized by the legislature. But the legislature of a State, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. And this authority can be conferred in such a manner that the objects can be attained either with or without a popular vote. *Thomson* v. *Lee County*, 327.
2. Power "to borrow money for *any* public purpose" gives authority to a municipal corporation to borrow money to aid a railroad company, making its road as a way for public travel and transportation; and, as a means of borrowing money to accomplish this object, such municipal corporation may issue its bonds, to be sold by the railway company to raise the money. *Rogers* v. *Burlington*, 654.

NATIONAL BANKS. See *Internal Revenue*, 6, 7, 8.

NAVIGATION.

1. Lookouts must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of their duty. *The Ottawa*, 268.
2. When acting as officer of the deck, and having charge of the navigation of the vessel, the master of a steamer is not a proper lookout, nor is the helmsman. *Ib.*
3. Lookouts should be stationed on the forward part of the vessel, where the view is not in any way obstructed. The wheel-house is not a

NAVIGATION (*continued*).

proper place, especially if it is very dark and the view is obstructed. *Ib.*

4. Elevated positions, such as the hurricane deck, are said by the court to be not in general as favorable in a dark night as those usually selected on the forward part of the vessel, where the lookout stands nearer the water-line, and is less likely to overlook small vessels deeply laden. *Ib.*

NEGOTIABLE INSTRUMENTS. See *Municipal Bonds*, 2.

1. Bonds with coupons, payable to bearer, are negotiable securities, and pass by delivery; and, in fact, have all the qualities and incidents of commercial paper. *Thomson* v. *Lee County*, 827.
2. If coupons to bonds are drawn so that they can be separated from the bonds, and like the bonds, are negotiable; the owner of them can sue on the coupons without producing the bonds to which they were attached, or without being interested in them. *Ib.*

ONUS PROBANDI. See *Evidence*, 12.

PATENT.

1. Where a party having made application for a patent for certain improvements, afterwards, *with his claim still on file*, makes application for another but distinct improvement in the same branch of art, in which second application he describes the former improvement, but does not in such second application claim it as original, the description in such second application and non-claim of it there, is not a dedication of the first invention to the public. *The Suffolk Co.* v. *Hayden*, 315.
2. Where the patent-office grants a patent for one invention, and afterwards, upon a claim filed previously to that on which such patent has been granted, issues another, the second patent, not the first, is void. *Ib.*
3. In cases for the infringement of patents, where there is no established license fee, general evidence may be resorted to in order to get at the measure of damages; and evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate. *Ib.*
4. The jury, in ascertaining the damages, upon this sort of evidence, is not to estimate them for the whole term of the patent, but only for the period of the infringement. And a recovery does not vest the infringer with the right to continue the use. *Ib.*

PARISH RECORD. See *Evidence*, 5, 6, 7.

PAYMENT. See *Promissory Note*.

PLEADING. See *Equity*.

POLICE REGULATIONS.

1 A license granted by the United States, under the Internal Revenue

POLICE REGULATIONS (*continued*).

Act of July 1st, 1862, to carry on the business of a wholesale liquor dealer, in a particular State named, does not, although it have been granted in consideration of a fee paid, give the licensee power to carry on the business in violation of the State laws forbidding such business to be carried on within its limits. *McGuire* v. *The Commonwealth*, 887.

PRACTICE. See *Admiralty*, 8; *Appeal*, 1–5; *California*, 1–8; *Evidence*, 1; *Jurisdiction*, 5–7.

I. In Cases Generally.

1. A motion in the Circuit Court to dismiss a case, from want of proper citizenship in the parties, cannot be made at the trial and after pleading a general issue and special defences. *De Sobry* v. *Nicholson*, 420.
2. Under the ninth rule of the Supreme Court, a writ of error or appeal from any judgment or decree rendered thirty days before the commencement of the term may be docketed and dismissed on motion of the defendant in error or appellee, unless the other side dockets the cause and files the record with the clerk of the court within the first six days of the term. But if no motion to dismiss be previously made, the record may be filed and the cause docketed at any time within the term. *Sparrow* v. *Strong*, 97.
3. The action of a Circuit Court relative to a motion and order for judgment, is a matter within the Circuit Court's discretion, and not a subject for review here. *Cheang-Kee* v. *United States*, 320.
4. Where the court sees no reason to doubt the correctness of a decision below, it will not reverse from doubt in cases where the issue is one entirely of fact, depending on the credibility of witnesses who differ in their statements, and where the District and Circuit Courts have concurred in viewing the merits; nor because an appellant can find in a mass of conflicting testimony enough to support his allegations if the testimony of the other side be wholly rejected, or can raise a *doubt* as to what justice required, by attacking the character of the witnesses of such side. *Newell* v. *Norton and Ship*, 257.
5. The court admitting that within reasonable limits cross-examination is a right, and on many accounts of great value, reflects upon an exercise of it as excessive in an ordinary case of collision in admiralty, where there were between four and five hundred cross-interrogatories. *The Ottawa*, 268.
6. If, in a case relating to custom duties of the United States, and at a time when gold and silver coin were alone a tender for payment of these duties, though notes of the government were so for most debts, judgment have been originally entered "payable in gold coin of the United States," &c., it may be amended during the term by the insertion of the words, "and silver," so as to read "payable in gold and silver coin of the United States." *Cheang-Kee* v. *United States*, 320.
7. Where a deposition, after a motion on grounds set forth has been unsuccessfully made at one term to suppress it, as irregularly taken, is

PRACTICE (*continued*).

at another read on trial without objection or exception, it cannot be objected to here on the grounds that were made for its suppression, or at all. *Brown* v. *Turkington*, 377.

8. A writ of error from this court is properly directed to the court in which the final judgment was rendered, and by whose process it must be executed, and in which the record remains, although such court may not be the highest court of the State, and although such highest court may have exercised a revisory jurisdiction over points in the case, and certified its decision to the court below. The omission in the record of these points, and the action in the highest court upon them, make no ground for *certiorari* on account of diminution. *McGuire* v. *The Commonwealth*, 382.

9. Where the counsel of a plaintiff in error withdraw their appearance, the defendant in error, under the 16th rule, has the right either to have the plaintiff called and the suit dismissed, or to open the record and pray an affirmance. *Ib.*

10. Under a statute which provides that new matter in an answer shall on trial be deemed controverted by the adverse party, witnesses may properly be examined, in a case where *such* an answer having new matter is put in. *Choong-Kee* v. *United States*, 320.

11. A petition for an appeal to this court from the Circuit Court, filed in the office of the clerk of the Circuit Court merely, unaccompanied by an allowance of the appeal by that court, does not bring the case up. An appeal thus made will be dismissed. *Barrel* v. *Transportation Company*, 424.

12. The ten days given by the 23d section of the Judiciary Act, to take a writ of error from this court, run from the day when judgment is entered in the court where the record remains; and when judgment is given in the highest court of a State on appeal or writ of error from an inferior one, and, on affirmance, the record is returned to such inferior court with order to enter judgment there, they run from the day when judgment is so there entered. *Green* v. *Van Buskirk*, 448.

13. When a bill of exceptions at all fairly discloses the fact that the exceptions were made in proper time, this court will not allow the right of review by it to be defeated because the bill is unskilfully drawn, or justly open, philologically, to censure. *Simpson & Co.* v. *Dall*, 460.

14 When the pleadings in an action of ejectment do not state the value of the property in controversy, the value may be shown at the trial. *Beard* v. *Federy*, 478.

15 Where under the act of 8th August, 1840, "to regulate the proceedings in the Circuit and District Courts," an indictment has been remitted from the Circuit to the District Court, and there demurred to, a joinder in demurrer may be made when the case is remitted back to the Circuit Court. *United States* v. *Murphy*, 649.

16. Where a demurrer to a declaration in the Circuit Court is improperly sustained, and judgment is rendered accordingly, the case may be reexamined here upon a writ of error without any formal bill of exceptions. *Rogers* v. *Burlington*, 654.

PRACTICE (*continued*).

17. Where a writ of error is taken to this court by a plaintiff below, who previously to taking the writ issues execution below and gets a partial but not a complete satisfaction on his judgment, the writ will not in consequence of such execution merely, be dismissed. *United States* v. *Dashiel*, 688.

18. A motion to dismiss an appeal in a decree of foreclosure, in chancery, refused, though the complainant below, appellant here, had, after his appeal made, issued execution and got the amount for which the decree he appealed from, gave him. *Merriam* v. *Haas*, 687.

II. IN PRIZE

19. Cases of prize are usually heard, in the first instance, upon the papers found on board the vessel, and the examinations taken *in preparatorio;* and it is in the discretion of the court thereupon to make *sua sponte*, or not to make, an order for further proof. But the *claimant* may move for the order, and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered; and such an order may also be made in this court. The making of it anywhere is controlled by the circumstances of each case. It is made with caution, because of the temptation it holds out to fraud and perjury; and made only when the interests of justice clearly require it. *The Sally Magee*, 451.

20. Prize courts deny damages or costs in cases of seizure made upon "probable cause;" that is to say, where there were circumstances sufficient to warrant suspicion, though not to warrant condemnation. *The Thompson*, 155.

PRESUMPTION. See *Court and Jury*.

PRIVILEGED COMMUNICATION.

On a question of marriage and legitimacy, an attorney, who drew a will for the alleged husband now deceased, in which the children of the connection set up as wedlock are described as the "natural children" of the testator, may, without violating professional confidence, testify what was said by the testator about the character of the children and his relations to their mother, in interviews between the testator and himself preceding and connected with the preparation of the will. *Blackburn* v. *Crawfords*, 176.

PRIZE. See *Blockade*, 1–8; *Public Law*, 1–15; *Practice*, 19–20.

PROBABLE CAUSE. See *Public Law*, 15.

PROMISSORY NOTE.

By the general commercial law a promissory note does not extinguish the debt for which it is given, unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when

PROMISSORY NOTE (*continued*).

dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. And although in Massachusetts the rule is different, and the presumption of law there is that a promissory note extinguishes the debt for which it is given, yet there the presumption may be repelled by evidence that such was not the intention of the parties; and this evidence may arise from the general nature of the transaction, as well as from direct testimony to the fact. *The Kimball*, 87.

Upon this ground it is not to be presumed that the owner of a ship having a lien upon a cargo for the payment of the freight, intended to waive his lien by taking the notes of the charterers drawn so as to be payable at the time of the expected arrival of the ship in port. The notes being unpaid, he may return them and enforce his lien. *Ib.*

PUBLIC LAW. See *Blockade*, 1–8; *Evidence*, 11; *Practice*, 19, 20.

1. No trade honestly carried on between neutral ports, whether of the same or of different nations, can be lawfully interrupted by belligerents; but good faith must preside over such commerce: enemy commerce under neutral disguises has no claim to neutral immunity. *The Bermuda*, 514.
2. Neutrals may establish themselves, for the purposes of trade, in ports convenient to either belligerent; and may sell or transport to either such articles as either may wish to buy, subject to risks of capture for violation of blockade or for the conveyance of contraband to belligerent ports. *Ib.*
3. Goods of every description may be conveyed to neutral ports from neutral ports, if intended for actual discharge at a neutral port, and to be brought into the common stock of merchandise of such port; but voyages from neutral ports intended for belligerent ports are not protected in respect to seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports. *Ib.*
4. Neutrals may convey to belligerent ports, not under blockade, whatever belligerents may desire to take, except contraband of war, which is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect; such seizure, however, is restricted to actual contraband, and does not extend to the ship or other cargo, except in cases of fraud or bad faith on the part of the owners, or of the master with the sanction of the owners. *Ib.*
5. Vessels conveying contraband cargo to belligerent ports not under blockade, under circumstances of fraud or bad faith, or cargo of any description to belligerent ports under blockade, are liable to seizure and condemnation from the commencement to the end of the voyage. *Ib.*
6. A voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports; and whether to be performed by one vessel or several employed in

PUBLIC LAW (*continued*).
the same transaction and in the accomplishment of the same purpose. *Ib.*
7. Destination alone justifies seizure and condemnation of ship and cargo in voyage to ports under blockade; and such destination justifies equally seizure of contraband in voyage to ports not under blockade; but, in the last case, ship and cargo not contraband are free from seizure, except in cases of fraud or bad faith. *Ib.*
8. Circumstances, such as selection of master, control in lading and destination, instructions for conduct of voyage, and other like acts of ownership by an enemy, may *repel*, in the absence of charter-party or other explanation, presumptions of ownership in a neutral arising from registry or other documents, and will warrant condemnation of a ship captured in the employment of enemies as enemy property. *Ib.*
9. Spoliation of papers, at the time of capture, under instructions and without explanation by production of the instructions, or otherwise, warrants the most unfavorable inferences as to employment, destination, and ownership of the captured vessel. *Ib.*
10. Neutrals who place their vessels under belligerent control, and engage them in belligerent trade; or permit them to be sent with contraband cargoes, under cover of false destination, to neutral ports, while the real destination is to belligerent ports; impress upon them the character of the belligerent in whose service they are employed, and the vessels may be seized and condemned as enemy property. *The Hart*, 559.
11. The property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize, though some of the partners may have a neutral domicile. *The Cheshire*, 231.
12. When a vessel is liable to confiscation, as enemy's property, the first presumption is that the cargo is so as well. *The Sally Magee*, 451.
13. Capture at sea of enemy's property clothes the captors with all the rights of the owner which subsisted at the commencement of the voy age; and anything done thereafter, designed to incumber the property or to change its ownership, is a nullity. *Ib.*
14. Prize courts properly deny damages or costs where there has been "probable cause" for seizure. *The Thompson*, 155.
15. Probable cause exists where there are circumstances sufficient to warrant suspicion, even though not sufficient to warrant condemnation. *Ib.*

PUBLIC POLICY.
1. Promissory notes given for a balance found due on settlement in a transaction itself forbidden by statute and illegal, or for money lent to enable a party to pay bills which the person taking the promissory notes had himself assisted, in violation of statute, to issue and circulate, cannot be enforced. *Brown* v. *Tarkington*, 377.
2. The fact that such promissory notes are given for a balance found due, or to enable a principal party in the illegal transaction to pay notes that have got into public circulation and are unpaid, does not purge

PUBLIC POLICY (*continued*).
them from the infirmity which belonged to the original vicious transaction. *Ib.*

QUO WARRANTO.
A proceeding in the nature of a *Quo Warranto*, in one of the Territories of the United States, to test the right of a person to exercise the functions of a judge of a Supreme Court of the Territory, must be in the name of the United States, and not in the name of the Territory. If taken in the name of the Territory the error may be taken advantage of on demurrer, and it is fatal. *Territory* v. *Lockwood*, 236.

REBELLION, THE.
1. A lien on enemy's property, set up under the act of March 3d, 1863, to protect the liens of loyal citizens upon vessels and other property which belonged to rebels, is not sufficiently proved by the test-oath of the party setting up the lien and asserting it without any specification as to date of origin, "from correspondence" with the parties and "copies of the invoice of the cargo" sworn to as "believed to be true;" the correspondence and copies not being produced, nor their absence accounted for. *The Sally Magee*, 451.
2. The act of July 13th, 1861, "to provide *for the collection of duties on imports*, and for other purposes," and which by one section, on a proclamation by the President, makes intercourse between citizens of those parts of the United States in insurrection against its government, with citizens of the rest of the United States unlawful, "so long as such condition of hostilities should continue," was not a temporary act, though passed during the late rebellion; nor on the cessation of hostilities did forfeitures, which had been incurred, after proclamation, under that section, cease to be capable of enforcement. *The Reform*, 617.
3. The act of 18th February, 1862, by which a sum of money was appropriated "for the purchase of cotton-seed, under the superintendence of the Secretary of the Interior, for general distribution, provided that the said cotton shall be purchased from places where cotton is grown as far north as practicable;" did not give power to the Secretary of the Interior to authorize an agent to transport merchandise to any district where the seed was to be got; such district having been then declared by proclamation, authorized by Congress, to be in a state of insurrection against the authority of the United States, and all intercourse with it prohibited, except where the President in *his* discretion might allow it in pursuance of rules prescribed by the Secretary of the *Treasury*. *Ib.*
4. Nor was a letter from the Secretary of the Interior to a person, which by its terms did no more than authorize and appoint him to "procure" a cargo of such seed "*in*" a prohibited or partially prohibited district (Virginia), and to "bring *it to*" a place not prohibited (Baltimore), even in its terms, such a license. *Ib.*

RECITALS. See *Judicial Proceedings*.

REPUTATION. See *Evidence*, 8.

RES JUDICATA. See *Illinois*, 5; *Maryland*, 1.

1. A plaintiff in attachment who indemnifies the attaching officer, and afterwards takes upon himself the defence when that officer is sued, is concluded by the judgment against that officer where such plaintiff is afterwards sued for the same trespass. *Lovejoy* v. *Murray*, 1.
2. The court—deciding that a case before it was the same in fact as one already twice decided by it in the same way—rebukes, with some asperity, the practice of counsel who attempt to make the judges bear the "*infliction of repeated arguments*" challenging the justice of their well-considered and solemn decrees; and sends the case represented by them out of court, with affirmance and costs. *Minnesota Co.* v. *National Co.*, 332.

SATISFACTION.

1. Levy of an execution, even if made on personal property sufficient to satisfy the execution, is not satisfaction of the judgment, and, accordingly, therefore, does not extinguish it if the levy have been abandoned at the request of the debtor and for his advantage; as *ex. gr.* the better to enable him to find purchasers for his property. *United States* v. *Dashiel*, 688.
2. A judgment against one joint trespasser is no bar to a suit against another for the same trespass. Nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar. *Lovejoy* v. *Murray*, 1.

STATUTES.

I. General Principles concerning.

1. In interpreting a section of a statute which remains in force, resort may be had to a proviso to it, although the proviso be repealed. *Bank for Savings* v. *The Collector*, 495.

II. Of the United States. See *Appeal*, 1, 5; *Capturing Force; Common Carrier*, 5, 6; *Customs of the United States*, 1, 2, 3, 5, 6; *Enrolment and Registry of Vessels*, 1–6; *Evidence*, 12; *Indians*, 1, 2; *Jurisdiction*, 1–5; *Rebellion*, 1, 2, 3.

2. The 12th section of the Judiciary Act of 1789, which gives to the Circuit Courts concurrent jurisdiction of all crimes and offences cognizable in the District Courts, is prospective, and embraces all offences the jurisdiction of which is vested in the District Courts by subsequent statutes. *United States* v. *Holliday*, 407.
3. Therefore the Circuit Courts have jurisdiction of the offence of selling ardent spirits to an Indian, under the act of February 12th, 1862 (12 Stat. at Large, 339), although by that act jurisdiction is vested only in the District Court. *Ib.*
4. Under the second section of the act of 8th August, 1840, "to regulate the proceedings in the Circuit and District Courts," which—after authorizing the transfer of criminal causes from either court to the other on motion of the district attorney—says, that "the court to which such remission is made, shall, after the order of remission is

STATUTES (*continued*).

filed therein, act and proceed in the case as if the indictment and all the other proceedings in the same had been originated in said court,' —an indictment may be remitted from the District Court to the Circuit Court, though it have come into the District Court originally only by being sent there from the Circuit Court. And a demurrer to the indictment made in the District Court, may properly receive a rejoinder in the Circuit Court. *United States* v. *Murphy*, 649.

5. A license granted by the United States, under the Internal Revenue Act of July 1st, 1862, to carry on the business of a wholesale liquor dealer, in a particular State named, does not, although it have been granted in consideration of a fee paid, give the licensee power to carry on the business in violation of the State laws forbidding such business to be carried on within its limits. *McGuire* v. *The Commonwealth*, 387.

6. Under the Internal Revenue Act of June 30th, 1864, as amended by the act of March 3d, 1865, the sales of stocks, bonds, and securities made by "*brokers*" for themselves are subject to the same duties as those made by them for others. *United States* v. *Cutting*, 441.

7. Under that act, amended as above said, "bankers" who sell Federal securities no otherwise than for the United States and for themselves, and who, therefore, do not sell them for others or for a commission, are not liable to pay the duties imposed by the 99th section, upon "brokers and *bankers doing business as brokers*." *United States* v. *Fisk*, 445.

8. The first section of the act of Congress of March 3d, 1851) 9 Stat. at Large, 635), entitled "An act to limit the liability of ship-owners, and for other purposes," exempts the owners of vessels in cases of loss by fire from liability for the negligence of their officers or agents, in which the owners have not directly participated. *Walker* v. *The Transportation Company*, 150.

9. The proviso to that act allowing parties to make their own contracts in regard to the liabilities of the owners, refers to express contracts. *Ib.*

10. Upon a comparison of the 25th section of the act of 3d March, 1863, passed during the rebellion, "for enrolling and *calling out* the national forces, and for other purposes," with the 12th section of the act of 24th February, 1864, enacting that any person who shall forcibly resist or oppose any *enrolment* of persons for military service, &c., shall be punished, &c.; *held*, that the former act is limited to the prevention of resistance to the *draft*, and the latter to preventing resistance to the *enrolment*. Comparing the two acts together, the latter one is to be regarded as a legislative construction of the first, by which a service in relation to the draft, is not a service in relation to the enrolment. *United States* v. *Scott*, 642; *Same* v. *Murphy*, 649

SURETY.

An amendment, neither increasing nor diminishing their liability, will not discharge the sureties to the usual bond given on release of a vessel seized by process of the admiralty. *Newell* v. *Norton and Ship*, 257.

TARIFF. See *Customs of the United States.*

TAXATION. See *Internal Revenue.*

TELEGRAPH. See *Common Carrier*, 4.

TERRITORIES. See *Quo Warranto.*

TEXAS.

The statute of Texas, relating to the organization, &c., of its District Courts, which enacts that when a party shall file an affidavit of the loss of an instrument recorded under the statute, or of his inability to procure the original, a certified copy of the record shall be admitted in like manner as the original—does not dispense with the proof which is exacted when the original instrument is filed, in case an affidavit (which the statute also allows) alleging a belief of its *forgery*, is made. It only allows the certified copy to take the plac of the original when that is lost or cannot be procured: and the copy produced under such circumstances will have no greater weight than the original itself. *Younge* v. *Guilbeau*, 636.

To avail himself, therefore, of the statute, the party must, in all cases, file, as therein prescribed, the original or the copy from the record, and give notice of the filing; and even then the statutory proof will be insufficient, if the affidavit alleging a belief of its forgery be made.

Such affidavit being filed, the party relying upon the deed must make proof of its execution, with all its essential formalities, as required by the rule of the common law. *Ib.*

TRESPASSER.

1. A bond of indemnity given by a plaintiff in an attachment to induce the officer to hold, after levy, property not subject to the writ, makes such plaintiff a joint trespasser with the officer as to all that is done with the property afterwards. *Lovejoy* v. *Murray*, 1.
2. A judgment against one joint trespasser is no bar to a suit against another for the same trespass. Nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar. *Ib.*
3. A plaintiff in attachment who indemnifies the attaching officer, and afterwards takes upon himself the defence when that officer is sued, is concluded by the judgment against that officer where such plaintiff is afterwards sued for the same trespass. *Ib.*

USAGE.

A usage opposed to a statute is void. *Walker* v. *Transportation Co.*, 150.

WISCONSIN. See *Judicial Proceedings.*